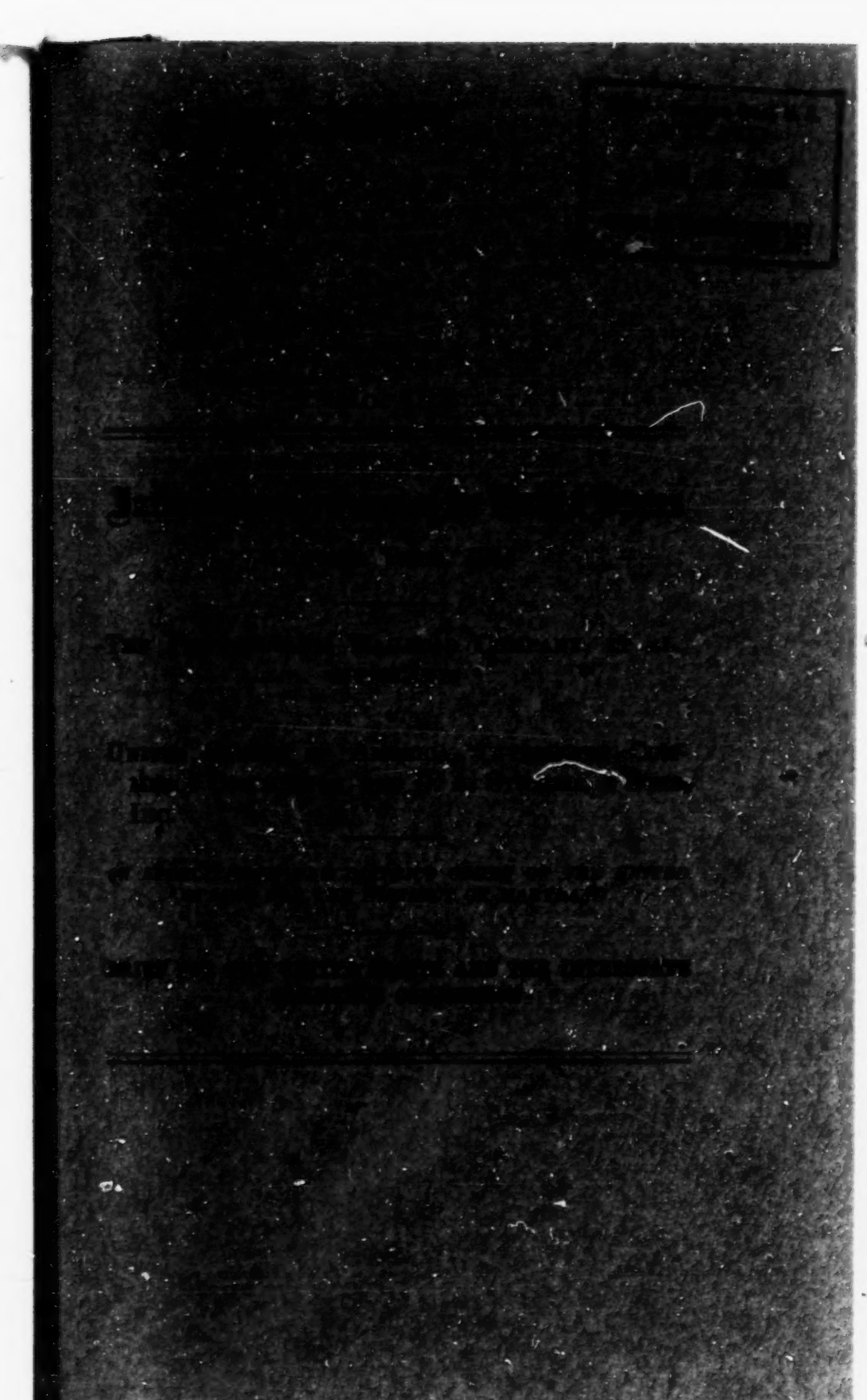

INDEX

CITATIONS

624096—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 182

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND D. A. STICKELL & SONS, INC.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (R. 77–102) is reported in 54 F. Supp. 381. The report of the Interstate Commerce Commission (Division 2) (R. 27–41) appears in 255 I. C. C. 333.

JURISDICTION

The final decree of the three-judge district court was entered March 22, 1944 (R. 102–103) and a stay pending appeal was issued on the same

day (R. 107–108). Petition for appeal was both presented and allowed on May 15, 1944 (R. 108–110). Jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219–221 (28 U. S. C. 47, 47a) and under Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (28 U. S. C. 345). Probable jurisdiction was noted on October 9, 1944 (R. 477).

QUESTIONS PRESENTED

The ultimate question concerns the validity of an order of the Interstate Commerce Commission dated March 18, 1943, under Section 15 (3) and Section 15 (4) (b) of Part I of the Interstate Commerce Act (49 U. S. C. 15 (3) and 15 (4) (b)). This order requires the establishment by various rail carriers, including appellants, of certain additional through routes and joint rates [1] applicable

[1] "Through routes" and "joint rates" were defined in *St. L. S. W. Ry. Co.* v. *United States*, 245 U. S. 136, 139, as follows:

> A "through route" is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a "through rate." This "through rate" is not necessarily a "joint rate". It may be merely an aggregation of separate rates fixed independently by the several carriers forming the "through route"; as where the "through rate" is "the sum of the locals" on the several connecting lines or is the sum of lower rates otherwise separately established by them for

thereto on shipments of grain and grain products moving from various midwestern points through Hagerstown, Maryland, to eastern destinations on the Pennsylvania Railroad, particularly those on the so-called Del-Mar-Va Peninsula[2] hereinafter referred to as the Peninsula.

Subordinate questions are:

1. Whether Section 15 (4) (b) of the Interstate Commerce Act is to be construed as authorizing the Commission to prescribe a through route depriving a carrier of its long haul between two points if the Commission finds that such route is needed to provide "adequate, and more efficient or more economic, transportation" from the standpoint of service to the shipping public, or only if it finds that such route will promote adequate, economic and efficient transportation from the standpoint of railroad operating costs and operating conditions.

2. Whether the Commission was justified under Section 15 (4) (b), upon complaint of a shipper, in comparing conditions on the proposed through routes not with conditions on the Pennsylvania Railroad's direct route to the East, but rather

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through transportation. *Through Routes and Through Rates*, 12 I. C. C. 163, 166. Ordinarily "through rates" lower than "the sum of the locals" are "joint rates." * * *

[2] The Del-Mar-Va Peninsula is that part of Delaware, Maryland and Virginia lying south of Wilmington, Delaware, and between the Chesapeake and Delaware Bays (R. 78).

with the conditions on its route to the East actually serving complainant.

3. Whether the Commission's order is supported by adequate findings and substantial evidence.

STATUTE INVOLVED

The pertinent provisions of Part I of the Interstate Commerce Act are reproduced in Appendix A, *infra*, pp. 59–62.

STATEMENT

The present report and order of the Interstate Commerce Commission were issued after hearing upon a complaint against various railroads, filed with that body by appellee D. A. Stickell & Sons (hereinafter referred to as Stickell), of Hagerstown, Maryland (R. 22–26). As amended at the hearing,[3] the complaint alleged

[3] The complaint, as originally filed, sought through routes via Hagerstown to "points in Trunk Line and New England territories", and the Baltimore and Ohio Railroad Company was named as one of the defendants (R. 24, 22). The complaint was amended at the hearing in order to narrow the relief sought to through routes at the present joint rates to the described destinations on the Pennsylvania. The transit rate and restricted routing situations on the Baltimore and Ohio are substantially similar to those on the Pennsylvania, and the former railroad feared that if the relief sought should be granted, a precedent would be established that would directly affect its interests. Accordingly, it introduced considerable evidence and otherwise participated in the proceedings before the Commission and district court (R. 27–28, 4) and is a co-appellant here (R. 108, 477).

that Stickell was denied reasonable through routes and joint rates on grain, grain products, and by-products moving from points in Ohio, Indiana, Illinois, Wisconsin, Iowa, Minnesota, Missouri, and Omaha, Nebraska, to Hagerstown, there mixed into livestock and poultry food, and the manufactured product reshipped to destinations on the Pennsylvania Railroad Company (hereinafter referred to as the Pennsylvania) east of York, Pennsylvania and Fulton Junction (Baltimore), Maryland, and between New York City and Cape Charles, Virginia, and particularly to destinations in the Del-Mar-Va Peninsula (R. 27-28). This complaint asked the Commission to exercise its power under Section 15 (3) of the Interstate Commerce Act to prescribe reasonable and non-prejudicial through routes and joint rates (R. 22–26).

From the Commission's report, the following facts appear:

Stickell manufactures livestock and poultry feed at Hagerstown, Maryland, by milling and mixing grain and poultry products obtained principally from points in the Midwest. About 10 percent of the materials used by it move inbound and out-bound by truck and 90 percent move by rail. The bulk of its production moves to points in New England, eastern Pennsylvania, Delaware, and the Del-Mar-Va Peninsula. About 50 or 60 percent of its production and about 90

percent of that part thereof that is handled by the Pennsylvania move to points in the Peninsula. The Pennsylvania is the only railroad serving those Peninsula points. (R. 28.)

Hagerstown is served by four railroads, including the Western Maryland Railroad and the Pennsylvania. It is situated 74.5 miles southwest of Harrisburg, Pennsylvania, on a branch line of the Pennsylvania, extending from that main-line point to Winchester, Virginia. The carriers, including the Pennsylvania, maintain joint through rates on grain and grain products from origins in central territory [4] and from the market points, Chicago, East St. Louis and Cairo, Illinois, and St. Louis, Missouri, to all points in trunk-line territory.[5] These rates are restricted, however, by the carriers to apply only over certain routes. For example, they do not apply on grain traffic originating in central territory destined to points on the Pennsylvania unless that railroad receives the traffic at or west of Pittsburgh, Pennsylvania, its western terminus in trunk-line territory. When the Pennsylvania has possession of such traffic consigned to destinations on certain other railroads it will interchange

[4] Central territory is roughly that territory west of Buffalo and Pittsburgh, north of the Ohio River, east of Chicago and St. Louis, and south of the Great Lakes (R. 78).

[5] Trunk-line territory is roughly that territory east of central territory, west of New England, and north of the Potomac River (R. 78).

with them at certain points. (R. 29.) However, no intermediate interchange with other carriers for final destinations on the Pennsylvania's own lines is provided, so that for traffic destined to points on the Pennsylvania to receive the through rates it must be carried exclusively on the Pennsylvania's rails from at least Pittsburgh all the way east (see R. 29). The Pennsylvania, for a transit charge in addition to the through rates, also maintains a transit privilege at Hagerstown, under which a shipper such as Stickell receives the through rate on grain and grain products from the origin of the grain to the destination of the product, despite the stoppage of the grain in transit for processing (see R. 28, 29, 30, 33). This privilege is also restricted by the Pennsylvania so that it applies only to traffic originated by it at or west of Pittsburgh, its western terminus in trunk-line territory, or received by it from its connections west of that terminus. However, the Pennsylvania route through Hagerstown involves an out-of-line haul, from its main line at Enola Yard (Harrisburg) to Hagerstown and return, of 149 miles.[6] For this out-of-line service

[6] The Pennsylvania's route from Chicago, as a representative origin point, through Hagerstown to the Peninsula, is shown on the map set forth in Appendix B (*infra*, p. 63). Under the tariff restrictions, in order for Stickell now to secure the through rates it must ship over the main line of the Pennsylvania from Chicago to Harrisburg, or at least over that part of such main line between Pittsburgh and Harrisburg, then back to Hagerstown over the branch line of the

the Pennsylvania imposes a charge of 4.5 cents per 100 pounds in addition to the through rates and the transit charge. Thus, in order for Stickell to reach the destinations here in issue it must pay 90 cents per ton in addition to the through rates and the transit charge. Its plant is on the tracks of the Western Maryland, but the Pennsylvania absorbs the Western Maryland's switching charge of $6.93 per car each way. (R. 30.)

Stickell did not assail the reasonableness of the through rates, the out-of-line charge or the transit charge (R. 30). Its position was that it should not be required to pay an out-of-line haul charge in order that the Pennsylvania might obtain the long hauls from its western termini in trunk-line territory. It desired establishment of the present joint through rates over two through routes, hereinafter referred to as routes 1 and 2 (set forth in the map appearing in Appendix B *infra*, p. 63) to destinations on the Pennsylvania; (1) over route 1, from the markets and origins in central territory on the New York Central Railroad Company and its connections other than the Pennsylvania via the New York Central to Youngstown, Ohio, thence via the Pittsburgh & Lake Erie to Connellsville, Pennsylvania, thence via the Western Maryland to Hagerstown, thence via the Western Maryland to York, Pennsylvania,

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Pennsylvania, then back to Harrisburg over the same track, then over the Pennsylvania's lines east to the Peninsula points (R. 29, 30).

or Fulton Junction (Baltimore), Maryland, and thence via the Pennsylvania to the Del-Mar-Va destinations; and (2) over route 2, from the same markets and origins on the Wabash Railway Company and its connections other than the Pennsylvania in central territory via the Wabash to Toledo, Ohio, thence via the Wheeling and Lake Erie Railway Company to Pittsburgh Junction, Ohio, thence via the Pittsburgh & West Virginia to Connellsville, thence via the same route as indicated in route 1 to the Del-Mar-Va destinations. (R. 31.) The joint rates now apply over these routes up to Hagerstown with transit at that point, thence via Western Maryland to destinations on that railroad, and from Hagerstown over the Western Maryland to Shippensburg, Pennsylvania, and numerous connecting railroads beyond (*ibid.*), including the Reading but not including the Pennsylvania (see R. 29–30).

As required under Section 15 (3) of the Interstate Commerce Act in order for it to establish joint rates and through routes, the Commission concluded that the routes sought by Stickell were necessary and desirable in the public interest (R. 34, 41). In support of this conclusion the Commission made the following subordinate findings (R. 32–33):

> It is not the province of railroads to determine what markets shall be available to sellers or buyers, or, by the refusal to establish through routes or the maintenance

of rate disadvantages, to restrict or circumscribe the opportunities of shippers located on other railroads to sell in markets served by them. It is their function to transport in the channels necessitated by trade conditions and not to fix limitations on commerce. The public interest demands that all shippers be accorded relatively equal opportunities to reach all reasonably available markets. The margin of profit on complainant's products is small. The two principal items entering into the selling price are the amounts paid for the materials and freight charges. Feed manufacturers at the rate-break points, and at Buffalo, N. Y., Fort Wayne and Indianapolis, Ind., Cincinnati, Toledo, Cleveland, and Akron, Ohio, and Pittsburgh, Lancaster, and York, Pa., can reach the destinations here considered at the through rates, but complainant, on grain purchased at the same origins when the Pennsylvania gets the in-bound haul from or beyond its trunk-line western termini, must pay 90 cents a ton more, or, when other carriers perform the in-bound haul, combination rates.[7] Clearly complainant is at a disadvantage.

* * * * *

The routes sought up to Hagerstown are well established and generally accepted as reasonable by shippers and the carriers parties thereto to points in eastern terri-

[7] Such combination rates would be higher than the through joint rates.

> tory. There is no showing or contention that those routes would be less economical as parts of the through routes sought to destinations considered on the Pennsylvania than to destinations on the other carriers in eastern territory. The routes sought in connection with the Pennsylvania would not only not result in any cross hauling or wasteful transportation but they would eliminate a 149-mile out-of-line haul and two switching interchanges at Hagerstown and would relieve the Pennsylvania from the expense of maintaining transit and absorbing the switching charges at Hagerstown. The Western Maryland would bear all the transit and switching expenses at that point.

The Commission considered whether the proposed routes would require any participating carrier, without its consent, to embrace in such routes substantially less than the entire length of its railroad lying between the termini of such proposed routes. Section 15 (4) of the Interstate Commerce Act (Appendix A, *infra*, pp. 61–62) forbids the Commission to "short-haul" a carrier in this fashion without its consent unless the Commission finds: (a) that "'such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established,'" or (b) "that the through route proposed to be established is needed in order to provide adequate, and

more efficient or more economic, transportation." The Commission stated that the Pennsylvania was the only carrier that would participate in these proposed routes which invoked the above short-hauling restriction of Section 15 (4), and that the carriers participating in these routes west of Hagerstown would receive the same hauls they now receive on traffic via Hagerstown to destinations in trunk-line territory (R. 35). It is obvious therefore that though the carriers participating west of Hagerstown, with the exception of the Western Maryland and the Pittsburgh & West Virginia, are appellants here, they are not deleteriously affected by the Commission's present order. This restriction against short-hauling a carrier was found to be applicable to the Pennsylvania inasmuch as the distance by the lines of that carrier over its present tariff route between Chicago and Salisbury, Maryland, using those points respectively as a representative origin and a representative destination, was 902 miles,[8] whereas the distance over route 1 via Fulton Junction (Baltimore) was 946 miles and via York 958 miles, and over route 2 via Fulton June-

[8] This figure does not, of course, include the round trip 149-mile out-of-line haul between Harrisburg and Hagerstown, on traffic moving from Chicago to Salisbury via Hagerstown, as Stickell's does (R. 30, 32–33). Stickell's traffic currently moves 1,051 miles (the 149-mile out-of-line haul plus the 902-mile route between Chicago and Salisbury, Maryland), which is longer than the total haul by way of either of the proposed routes (R. 34).

tion 938 miles and via York 950 miles. (R. 34.) The Commission concluded that the Pennsylvania's direct route was not unreasonably long (*ibid.*), so that subsection (a) of Section 15 (4) could not be invoked to deprive the Pennsylvania of its long haul. The Commission did, however, invoke (R. 35–41) subsection (b) of Section 15 (4) in order to prescribe these routes short-hauling the Pennsylvania, making the following ultimate finding as required under the statute (R. 41):

> We find that the two routes sought are necessary and desirable in the public interest and that they are needed to provide adequate and more efficient and adequate and more economical transportation and should be established, subject to the lowest through rates contemporaneously maintained on the same commodities from the same origins to the same destinations over the direct routes of the Pennsylvania, or over routes in which the Pennsylvania is a participating carrier via Enola Yard near Harrisburg.

Just as it now urges (Br. 28–68), the Pennsylvania urged below and before the Commision that the phrase "adequate, and more efficient or more economic, transportation" in Section 15 (4) (b) has reference solely to the adequacy, economy and efficiency of transportation from the standpoint of railroad operating conditions and operating costs, and not to the adequacy, efficiency and economy of transportation service from the stand-

point of the shipping public. This contention was rejected by the Commission with this statement (R. 39–40):

> Prior to the amendment of Section 15 (4) [by the Transportation Act of 1940, 54 Stat. 899, 911], the Commission's power to prescribe through all-rail routes which would short haul any carrier participating therein without its consent was limited to instances where the inclusion of the entire length of its railroad between the termini of such route would make the through route unreasonably long as compared with another practicable route which could otherwise be established. While that section limited the powers of the Commission, it left it entirely within the discretion of the carrier as to whether it would insist upon its long hauls. It was at liberty to voluntarily join in any route which it believed to be more adequate, efficient, and economical than a route embracing its entire line, although the latter route might not be unreasonably long. Therefore no exception to the restriction on the Commission's power was necessary to protect the carriers' interests.
>
> As to the shippers, however, a different situation existed. It rests within the power of carriers by insistence on their long hauls to place localities and shippers on the lines of other carriers or not on their direct lines at severe rate and competitive disadvantages and, as in the instant case, to

deprive shippers of relatively equal opportunities to compete in markets served only by them. Carriers in many instances availed themselves of the right to their long haul, and the disadvantaged localities and shippers had no redress. It was to remedy that situation, apparently, that the second exception was added. The Commission was thereby given authority, when it finds that through routes are "needed in order to provide adequate and more efficient or adequate and more economic transportation," to require the establishment of such routes although they may short haul one or more of the participating carriers. We interpret that exception to mean adequate and more efficient and more economic from the public's or shippers' as well as the participating carriers' standpoint. That such was the intent of the Congress is evident from the conditions the amendment was apparently designed to correct, from the fact that in the added proviso even the preference to be accorded the originating carrier is made subservient to the public interest, from both limitations on the right of a carrier to retain its long haul, and from the fact that the Congress specifically provided that, as between carriers, "No through route or joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

The Commission, having interpreted this exception to mean adequate and more efficient from the public's or shippers', as well as the participating carriers', standpoint, made the following subordinate findings (R. 36, 40) from the standpoint of the shipper, with respect to the adequacy, efficiency and economy of the service over the present route and over the proposed additional routes and in support of its ultimate finding quoted above (p. 13):

> Complainant does not question the adequacy, efficiency, or economy of the Pennsylvania service over its direct routes but only over its route via Hagerstown. As to the latter, it contends the routes sought would be more adequate, efficient, and economic from the shipper's standpoint. Based on the fact that the out-of-line and interchange service at Hagerstown would be eliminated, on the fact that a car leaving Hagerstown via the Western Maryland late in the morning arrives at Elsmere Junction (Wilmington) on the Reading the next morning, and on information received from the Western Maryland, complainant estimates that it would save 2 days in reaching destinations in the Del-Mar-Va peninsula if the routes sought were established. Its experience shows that it takes 1 day each way between Harrisburg and Hagerstown and 1 day for each interchange between the Western Maryland and Pennsylvania at Hagerstown, making a total of

> 4 days required for the out-of-line service, and that it takes an average of 3 to 4 days for the movement of a car from its plant to destinations on the Del-Mar-Va peninsula.
>
> * * * * *
>
> That the present route is not as adequate and efficient as the routes sought, so far as the shipper is concerned, is evidenced by the fact that, in order to meet the demands of customers for prompt delivery, complainant shipped 640 cars from Hagerstown over the Western Maryland and the Reading to Elsmere Junction thence by truck to points on the Del-Mar-Va peninsula.[9] The fact that the proposed routes would be more economical to the shipper is shown by the fact that the saving in transportation charges would be 4.5 cents per 100 pounds on all grain and grain products moving over those routes and transited at Hagerstown, as compared with the charges over routes of the Pennsylvania via Enola yard [near Harrisburg, Pennsylvania] heretofore described.

An order (R. 41–43) to carry out the finding in the report of Division 2 of the Commission was entered by that Division on March 18, 1943, the same day as its report was issued. This order directed the railroads, defendants before the

[9] This shipment occurred in 1940 via the Western Maryland to Shippensburg, Pennsylvania, thence via the Reading to Elsmere Junction (Wilmington), Delaware (R. 28).

Commission, including the appellants here, to establish and maintain joint rates on grain, grain products and by-products taking the same rates as grain, in carloads from (a) points on the lines of the New York Central Railroad Company and the Wabash Railway Company and their connections other than the Pennsylvania in Ohio, Indiana, and Illinois, and (b) the market points of St. Louis, Missouri, and Chicago, East St. Louis and Cairo, Illinois, when originating beyond those market points, over routes (1) and (2) (described *supra* pp. 8–9) through Hagerstown to destinations on the lines of the Pennsylvania east of York and Fulton Junction (Baltimore) and between New York City and Cape Charles, Virginia. It further directed that such joint rates should not exceed the lowest through rates contemporaneously maintained on like traffic from the same origins to those destinations over the direct route of the Pennsylvania or over routes in which it is a participating carrier via its Enola Yard near Harrisburg.

Appellants' petition for reconsideration (R. 126–181) having been denied by the full Commission on October 4, 1943 (R. 198), they sued the United States on November 4, 1943, in the United States District Court for the District of Maryland, to set aside the Commission's order of March 18, 1943 (R. 3–21). The Commission and Stickell intervened as defendants (R. 44, 53, 54).

Final hearing was held before a specially constituted three-judge court on January 26, 1944 (R. 72). A certified copy of the oral testimony and documentary exhibits introduced in the proceedings before the Commission was received in evidence by the court (R. 76). On March 2, 1944, the court filed a written opinion (R. 77–102) and on March 22, 1944, a final decree dismissing the complaint was entered (R. 102–103).

SUMMARY OF ARGUMENT

I

A. The Commission's construction of Section 15 (4) (b) of the Interstate Commerce Act as referring to the adequacy, economy and efficiency of transportation from the standpoint of the shipping public as well as from the standpoint of railroad operating conditions and operating costs is supported by the language of the Section. This Section, added by the Transportation Act of 1940, can have reasonable meaning from either standpoint, and the word "transportation", whether construed in accordance with the general definition of t[illegible]t term in the Act, or in accordance with the more literal meaning, obviously has reference as much to the transportation service received by the shippers as to that furnished by the carriers. Actually Congress must have used this language more from the shippers' than from the carriers' standpoint, since there was more need to give

the Commission power to prescribe routes short-hauling a carrier when that would provide adequate and more efficient or more economic transportation from the shippers' standpoint than when it would provide such from the carriers' standpoint. Thus a carrier would naturally voluntarily waive its long-haul rights as to a route considered more advantageous from its standpoint, making the Commission's intervention unnecessary. But where the route was only more advantageous to shippers the carriers would very likely refuse to consent to being short-hauled, and the shippers would be powerless to secure such advantages unless the Commission was given the power to compel the carrier to accept such routes. The phraseology was adopted from language used by Congress earlier in Section 15 (a) (2) of the Act, as amended by the Emergency Transportation Act of 1933, and by this Court earlier in explaining the phrase "public interest" as used in Section 5 of the Act. As there used it was clear that Congress and this Court had reference to the adequacy, economy and efficiency of transportation from the shippers' as well as the carriers' standpoint, and it is reasonable to assume that Congress intended the same meaning to be given this language when it was reiterated here in slightly abbreviated form.

B. The Commission's construction is also supported by the legislative history of Section 15 (4)

(b). That Section, as finally passed in the Transportation Act of 1940, was a compromise between a Senate bill which would have removed the short-haul restriction entirely and a House bill which would have left the restriction completely intact. The Senate provision stemmed from several earlier independent through-route bills which also had sought to remove this restriction entirely. Such bills were introduced on the recommendation of the Commission to modify the interpretation placed on the short-haul restriction of Section 15 (4) by this Court in *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269 (the *Subiaco* case). In making its recommendation the Commission was clearly concerned with the situation from the shippers' as well as the carriers' standpoint. The hearings and the Committee reports on the earlier bills, and the subsequent debate in the Senate on the original Senate version of the Transportation Act of 1940, reveal that shippers were strongly supporting such legislation and that the Senate was keenly concerned with their interest. To construe the language finally adopted in the compromise as referring solely to adequacy, economy and efficiency of transportation from the standpoint of railroad operation would be to conclude that this compromise netted shippers practically nothing. Yet it is unthinkable that in the compromise all Congressional desire to help the shippers, so strongly manifest in the earlier pro-

ceedings, would so suddenly have abated. A much more plausible view of the compromise, one which does not disregard entirely the interests of shippers or carriers, is that the Commission was empowered by the compromise to short-haul carriers when that was necessary to provide adequate and more efficient or more economic transportation for the shippers, but that in return the carriers were to be protected against the prescription of through routes "for the purpose of assisting any carrier that would participate therein to meet its financial needs." This conclusion is strengthened by the fact that the carriers had opposed the complete removal of the short-haul restriction primarily because they feared that with the restriction removed, the Commission might be empowered to prescribe through routes to aid financially needy short-line carriers as it had earlier sought to do. This construction gains further support from the fact that the words "adequate and efficient transportation", finally chosen, had been used from the shippers' standpoint at a Congressional committee hearing on one of the through-route bills by a witness representing shippers.

II

The Commission properly construed Section 15 (4) as permitting it to compare the proposed through routes not with Pennsylvania's direct route but with its route through Hagerstown.

Appellants' contention to the contrary is not supported by the fact that the short-haul restriction in this Section provides that the Commission shall not require any carrier by railroad to embrace in a proposed through route substantially less than the entire length of its railroad which lies between the termini of such proposed route. The phrase "between the termini" is not found in the exception to the restriction set forth in subsection (b). In any event it means only that a carrier's long haul, subject to protection, embraces the total length of its line between the termini and not just the length of its line after it has obtained possession of traffic under a prescribed through route. It would be impossible for the Commission on the complaint of a Hagerstown shipper to determine under exception (b) whether a proposed route through Hagerstown would be "more efficient or more economic," either from the standpoint of service to the shipper or from the standpoint of railroad operation, if it did not compare conditions over such route with conditions over existing routes actually available to the Hagerstown shipper. The construction advanced by appellants seems so unreasonable that it must be rejected even if it were required by the literal language, which it is not. *United States* v. *American Trucking Associations,* 310 U. S. 534, 543.

III

If the Commission properly construed Section 15 (4) (b), it follows that its ultimate conclusion that the "two routes sought are needed to provide adequate and more efficient and adequate and more economical transportation" is supported by adequate subordinate findings and substantial evidence. That the present service is not adequate is indicated by the Commission's finding that in order to meet the demands of its customers for prompt delivery, instead of being able to employ Pennsylvania's all-rail service, Stickell had shipped 640 cars from Hagerstown over the Western Maryland and the Reading to Elsmere Junction (Wilmington), thence by truck to points on the Peninsula. That the proposed routes would offer more efficient service from the shippers' standpoint is indicated by the Commission's statement that Stickell estimated that it would save 2 days in reaching destinations in the Peninsula if the routes sought were established. Finally, it is plain that the proposed routes would be more economical to the shipper from the Commission's finding that they would result in saving the Pennsylvania's out-of-line charge of 4.5 cents per 100 pounds. These findings afford a rational basis for the Commission's ultimate conclusion and they are supported by substantial evidence. The question of what is needed to provide adequate and more efficient or more economic transportation is one of those nu-

merous factual questions entrusted to the Commission's informed judgment, whose conclusion with respect thereto is binding upon the courts if supported by a rational basis and substantial evidence. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145–146; *Barringer & Co.* v. *United States*, 319 U. S. 1, 6–7.

ARGUMENT

I

THE COMMISSION PROPERLY CONSTRUED SECTION 15 (4) (b) AS REFERRING TO ADEQUACY, ECONOMY AND EFFICIENCY OF TRANSPORTATION FROM THE STANDPOINT OF THE SHIPPING PUBLIC AS WELL AS FROM THE STANDPOINT OF RAILROAD OPERATING CONDITIONS AND OPERATING COSTS

A. THE LANGUAGE OF SECTION 15 (4) (b) SUPPORTS THE COMMISSION'S CONSTRUCTION

Section 15 (3) of Part I of the Interstate Commerce Act authorizes the Commission to establish joint rates and through routes "whenever deemed by it to be necessary or desirable in the public interest." But Section 15 (4), as amended by the Transportation Act of 1940 (54 Stat. 899, 911), provides that in establishing such through routes a carrier shall not be short-hauled without its consent—

> (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and

> more efficient or more economic, transportation: *Provided,* however, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs.

On its face, the phrase "needed in order to provide adequate, and more efficient or more economic, transportation" contains no words indicating that, as appellants urge (Br. 28–72), it is to be construed solely from the carriers' physical operating standpoint rather than from the standpoint of service to the shipping public, and the phrase can have reasonable meaning as considered from either standpoint. In fact, it appears that Congress must have used this language more from the shippers' standpoint than from the carriers'. Thus, the Commission's report points out (R. 39–40) that no exception to the restriction against short-hauling was necessary to insure through routes which would be more efficient and economic from the railroads' operating standpoint. This is because such restriction, by its terms, applies only to short-

hauling a carrier "without its consent," and a carrier could voluntarily consent to being short-hauled when the result would be a through route providing more efficient and economic operation from its standpoint, making an order by the Commission under the exception provision in the carrier's behalf unnecessary. On the other hand, an order by the Commission under the exception provision would, in many cases, be necessary to provide adequate and more efficient or economic transportation service, from the shippers' standpoint, where a carrier would not consent to being short-hauled because its own interests might be countervailing.

Appellants, however, assert (Br. 31) that if the general definition of "transportation" contained in Section 1 (3) (a) of the Act is applied to that word in Section 15 (4) (b), then "transportation," as used in the latter Section, must be considered as having reference solely to the physical operations conducted by the carrier. The definition in Section 1 (3) (a) reads as follows:

> The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigera-

> tion or icing, storage, and handling of property transported.

Not only does this definition not purport to be all-inclusive, but it is evident from the latter part that "transportation", as there used, is to be construed as "transportation service". If this definition is applied to "transportation" as used in Section 15 (4) (b), the Commission was certainly justified in construing that Section from the shippers' as well as the carriers' standpoint, for the word "service" connotes that which is received as well as that which is given. Thus, Webster's New International Dictionary (2d ed., 1935) states that service may mean "anything supplied for accommodation" such as "work * * * done to meet the needs of customers" or "a scheduled accommodation for transportation". On the other hand, the Commission's construction was equally justified if "transportation" is given its common meaning, for the same dictionary defines that word as "the act of transporting, or state of being transported."

It is evident, too, as the district court observed (R. 90), that Congress in Section 15 (4) (b) was only repeating, in somewhat abbreviated form, language first used by it in Section 15 (a) (2) of the Interstate Commerce Act, as amended by the Emergency Transportation Act of 1933 (48 Stat. 211, 220). This language was as follows:

> In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, * * * to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

This language was reiterated in Section 15 (a) (2), as amended by the Transportation Act of 1940 (54 Stat. 898, 912). There can be no doubt of the meaning of the above language, since, in view of the use of the phrase "need, in the public interest" and the words "transportation service," it was plain that the Commission was to consider the needs of both the shipping public and the carriers. The phraseology of Section 15 (4) (b), for present purposes, differs from the pertinent language of Section 15 (a) (2) only in that while it speaks of a through route "needed," it does not qualify that word by the phrase "in the public interest," and it does not use the word "service" after "transportation." But Section 15 (4) (b) immediately follows Section 15 (3) and is to be construed in connection with that Section,[10] which speaks of through routes "necessary or desirable

[10] The opening clause of Section 15 (4), "In establishing any such through route," would be meaningless without reference to Section 15 (3).

in the public interest," so that it is evident that Congress used the word "needed" in Section 15 (4) (b) as if qualified by the same phrase "in the public interest." That Congress had in mind generally the "public interest" in Section 15 (4) (b) is also apparent from the fact that in the proviso to that Section it provided that the Commission, "consistent with the public interest," should give reasonable preference to the carrier originating the traffic. And, as has been indicated above, the word "transportation," standing alone, is the equivalent of "transportation service." Therefore, it is logical to conclude that when Congress used this similar but abbreviated language in Section 15 (4) (b) it did so with the intention that such language, like that in Section 15 (a) (2), was to be construed as requiring the Commission to consider the needs of the shipping public.

The language in Section 15 (4) (b) seems also to have been adopted from the language used by this Court on several occasions in construing the term "public interest" in Section 5 of the Interstate Commerce Act, as successively amended by the Transportation Act of 1920, the Emergency Transportation Act of 1933, and the Transportation Act of 1940. For example, in *New York Central Securities Co.* v. *United States*, 287 U. S. 12, 24–25, in referring to the criterion of "public interest" as used in that Section, whereby consolidations of carriers are permitted when the

Commission finds them to be in the public interest, the Court said:

> Appellant insists that the delegation of authority to the Commission is invalid because the stated criterion is uncertain. That criterion is the "public interest". It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary. Going forward from a policy mainly directed to the prevention of abuses, particularly those arising from excessive or discriminatory rates, Transportation Act, 1920, was designed better to assure adequacy in transportation service * * *. The provisions now before us were among the additions made by Transportation Act, 1920, and the term "public interest" as thus used is not a concept without ascertainable criteria, but has directed relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred.

The language of this opinion has been adopted and quoted in several later decisions dealing with the phrase "public interest" used in the same

Section, as amended by subsequent Acts. *Texas* v. *United States,* 292 U. S. 522, 531; *United States* v. *Lowden,* 308 U. S. 225, 230; *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 80–81. The following segment of the *McLean Trucking Co.* opinion is relevant:

> The national transportation policy is the product of a long history of trial and error by Congress in attempting to regulate the nation's transportation facilities beginning with the Interstate Commerce Act of 1887. For present purposes it is not necessary to trace the history of those attempts in detail other than to note that the Transportation Act of 1920 marked a sharp change in the policies and objectives embodied in those efforts. "Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates"; and emphasis on the preservation of free competition among carriers was part of that effort. The Act of 1920 added "a new and important object to previous interstate commerce legislation." It sought "affirmatively to build up a system of railways prepared to handle promptly the interstate traffic of the country." * * * And in administering it, the Commission was to be guided primarily by consideration for "adequacy of transportation service, * * * its essential conditions of economy and efficiency, and * * * appropriate provi-

> vision and best use of transportation facilities. * * *" *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 25.

The Court in these decisions had reference to adequacy, economy and efficiency of transportation from the shippers' standpoint, in view of its use of the word "service" after "transportation." And while it also apparently had reference to adequacy, economy and efficiency of transportation from the carriers' standpoint, it obviously did not believe that such words, as there used, were to be considered solely in that light. Thus it took pains to insure that the carriers' interests would be protected by the use of the additional specific language "appropriate provision and best use of transportation facilities," which would have been unnecessary if the preceding words, "adequacy, economy and efficiency" were intended to be construed solely from the carriers' viewpoint. The importance of the language of these cases here is emphasized by the fact that it was used by the Court in defining "public interest". It has already been shown that the same term is used in Section 15 (3) which Section 15 (4) (b) qualifies, and that Congress otherwise had in mind the public interest in the latter Section, as indicated by the proviso thereof with respect to the preference of an originating carrier. And again, although this Court in the foregoing passages was speaking with respect to

"transportation service" rather than with respect to "transportation", it has been demonstrated above that the two may be regarded as synonymous. Consequently, it is reasonable to suppose that Congress in the language employed in Section 15 (4) (b) meant the same thing as this Court meant in the similar language employed in the above decisions.

It is significant too that the declaration of transportation policy set forth in the Transportation Act of 1940 (49 U. S. C. 1) states that it is the Congressional policy, among other things "to promote safe, adequate * * * and efficient service," and further requires that "all of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." This provision bolsters the conclusion that the Commission in Section 15 (4) must consider the adequacy, economy and efficiency of transportation (service), and it has been established that service connotes that which is received as well as that which is furnished.

This construction of Section 15 (4) adopted by the Commission does not, as the carriers urge (Br. 34–37), have the effect of vitiating the restriction on short-hauling. It does not mean that the Commission may short-haul a carrier every time that will result in adequate and more efficient and economic transportation from the standpoint alone of the shipping public. As the district court pointed out in this connection (R. 93):

> Under the construction which we give to clause (b), even if the shipper is able to prove that the proposed new route would give him more efficient or more economic transportation,—better (as for example quicker) or cheaper service,—since, by the express language of paragraph (3) of Section 15, the Commission may never establish a through route unless "deemed by it to be necessary or desirable in the public interest", we have no doubt but that this language, fairly interpreted, must be taken to include also considerations of railroad operating efficiency and economy, which, in a given case, may control over considerations in the shipper's favor.

This construction does not mean that Section 15 (4) will add no protection to a carrier's long-haul rights which is not already provided by Section 15 (3). For instance, it might well be in the public interest, and thus permissible under Section 15 (3), for the Commission to aid a weak short-line carrier by prescribing a through route for its benefit which short-hauled another carrier. That, in fact, was what the Commission endeavored to do in *Fort Smith S. & R. I. R. Co.* v. *A. & V. Ry.*, 107 I. C. C. 523, 524 (known as the *Subiaco* case), but such action might not result in "adequate, and more efficient or more economic, transportation" from either the carrier's or the shipper's standpoint, and accordingly might not be permitted under Section 15 (4). Further-

more such action by the Commission is specifically forbidden by other language of Section 15 (4).

Finally, the Commission's construction of this statutory provision is entitled to much weight, especially where it is a contemporaneous construction by the administrative agency entrusted with the responsibility of setting the machinery of a new Act in motion, and where the Commission had much to do (see *infra*, pp. 39, 44) with the provision's enactment. *Gray* v. *Powell*, 314 U. S. 402; *United States* v. *American Truckers Association*, 310 U. S. 534, 549. The Transportation Act of 1940 is a broad remedial Act which must be liberally construed and whose restrictions (as in Section 15 (4)) must be strictly construed. *Piedmont and Northern Ry.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311–312; *McDonald* v. *Thompson*, 305 U. S. 263, 266; *Gregg Cartage and Storage Co.* v. *United States*, 316 U. S. 74, 83.

B. THE LEGISLATIVE HISTORY OF SECTION 15 (4) (b) SUPPORTS THE COMMISSION'S CONSTRUCTION

As amended by the Transportation Act of 1920 (41 Stat. 474, 485), Section 15 (3) of the Interstate Commerce Act gives the Commission its present-day power to prescribe through routes and joint rates, "whenever deemed by it to be necessary or desirable in the public interest." The same Act (41 Stat. 474, 486) adopted in Section 15 (4) a restriction against short-hauling substantially like that in this Section today, ex-

cept that the provision then enacted did not contain the language now found in Section 15 (4) (b). In construing the language of Section 15 (4), the Commission ruled that the short-haul restriction protected the long-haul of the originating carrier or a subsequent carrier only with respect to the length of its lines after it had once obtained possession of the traffic, and not with respect to the total length lying between the particular termini. *E. g., Waverly Oil Works* v. *P. R. R. Co.*, 28 I. C. C. 621, 630–631; *Fort Smith S. & R. I. R. Co.* v. *A. & V. Ry.* (the *Subiaco* case), 107 I. C. C. 523, 524. In the latter case, the Commission compelled the Missouri Pacific Railroad to join with a short-line carrier in a through route which embraced substantially less than the entire length of the former's railroad lying between the termini involved, solely to meet the financial necessities of the short-line carrier. Subsequently this Court set aside this order on the ground that Section 15 (4) must be construed according to its terms, and, as so construed, meant that the long-haul, subject to protection, embraced the total length of a carrier's line between the termini, and not just the length of its lines after it had obtained possession of the traffic under the prescribed through route. *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269 (also known as the *Subiaco* case). The Court remarked (pp. 277–278) that "Inconvenience or hardships, if

any, that result from following the statute as written must be relieved by legislation."

Prior to this Court's decision in the *Subiaco* case, Stickell had brought a complaint substantially like the present one, in which the Commission was asked to prescribe several routes including one to points on the Pennsylvania identical with Route 1 in the present case. The Commission, construing Section 15 (4) as it had done in the *Subiaco* case, first held that such route would not short-haul the Pennsylvania, and directed the carriers to adopt this new route. *Stickell & Sons* v. *Western M. Ry. Co.*, 146 I. C. C. 609, 613–614, 617–618. However, after further hearing, and in deference to this Court's subsequent decision in the *Subiaco* case, the Commission later found that the proposed routes would short-haul the carriers, including the Pennsylvania, under Section 15 (4). Since it further found that the exemption, allowing short-hauling when the existing routes are unreasonably long as compared to those proposed, was not applicable, it dismissed the complaint. *Stickell & Sons* v. *Western M. Ry. Co.*, 153 I. C. C. 759. In so doing, however, the Commission declared (p. 765):

> It is probable, indeed, that the construction placed by the Supreme Court upon section 15 (4) will make section 15 (3) impossible of application in many instances. That, however, as the court sug-

gests, is a matter for the consideration of Congress.

Thereafter, in a number of annual reports,[11] beginning with its forty-third, in 1929, the Commission recommended to Congress that Section 15 (4) be amended to adopt the construction of the short-haul restriction which it had applied in the *Subiaco* case, and which had been rejected by this Court. In making such recommendation the Commission was concerned with the situation from the shippers' as well as the carriers' standpoint. Thus, it stated in its 43rd Annual Report (p. 79) that the existing situation "is likely to result in substantial nullification in many instances of a statutory provision of great importance to shippers and sometimes to carriers as well." While the Commission recommended, at first, only that the earlier construction of the short-haul restriction be re-established, Commissioner Eastman, chairman of the Commission's legislative committee, subsequently informed a Congressional committee that "upon considering the matter, it seemed to the Commission that there was no reason why there should be any limitation."[12]

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[11] See, *e. g.*, 43rd Annual Report, p. 79; 44th Annual Report, p. 79; 46th Annual Report, pp. 36–37, 102; 50 h Annual Report, p. 108; 51st Annual Report 106. See also S. Rep. No. 433, 76th Cong., 1st sess., pp. 21–22.

[12] Hearings on H. R. 3400, 76th Cong., 1st sess., before a subcommittee of the House Interstate and Foreign Commerce Committee (p. 5).

Several bills were thereafter introduced in the Seventy-fourth, Seventy-fifth, and Seventy-sixth Congresses, known as "through-route bills," which uniformly would have repealed the short-haul restriction of Section 15 (4) entirely and allowed the Commission to prescribe any through route whenever under Section 15 (3) it was deemed necessary or desirable to do so in the public interest.[13] Extensive hearings before Congressional committees were held on these bills, two of them were reported out to the Senate,[14] and one was passed by that body,[15] but none of these bills was ever finally enacted.

The hearings on these bills disclose that shippers were deeply concerned with them and strongly supported their passage. Thus, Charles R. Seal, acting chairman of the National Industrial Traffic League, one of the largest organizations of shippers, testified as follows at the hearings before the subcommittee of the House Interstate and Foreign Commerce Committee on S. 1261, 75th Cong., 2d sess. (pp. 39–40):

> From the standpoint of shippers, it seems to me, power on the part of the Commission to prescribe through routes is almost, if not

[13] H. R. 5364, 74th Cong., 1st sess.; S. 1636, 74th Cong., 2d sess.; S. 1261, 75th Cong., 1st sess.; S. 1085, 76th Cong., 1st sess.; H. R. 3400, 76th Cong., 1st sess.

[14] S. Rep. No. 1970, 74th Cong., 2d sess.; S. Rep. No. 404, 75th Cong., 1st sess.

[15] S. 1261 passed the Senate on August 10, 1937 (81 Cong. Rec. 8603).

> equally as important, as the power to prescribe reasonable rates.

It is highly significant, also, that in the following colloquy at the same hearing he used the words "adequate and efficient transportation", now found in Section 15 (4), from the shippers' viewpoint (p. 41):

> Mr. HOLMES: Your organization is primarily interested in cheaper transportation; is that right?
>
> Mr. SEAL: No. We are primarily interested in adequate transportation.
>
> Mr. HOLMES: Well that also applies to cheaper transportation.
>
> Mr. SEAL: Not necessarily. We would not want, I think I may say—although this is partly a personal view—we would not want cheap transportation at the sacrifice of adequate and efficient transportation.

Furthermore, Mr. D. A. Stickell, president of the present complainant before the Commission, appeared at the same hearing in support of the bill and said (p. 42):

> I bring these facts to your attention simply to show you the effect which the present law is having on our business. If it had not been for the Subiaco decision [278 U. S. 269], which caused the Interstate Commerce Commission to have to change its position, we would now be, and would have been for many years, able to compete in a much wider territory, and would have

been able to develop our business to a much greater extent than has been possible.

It is our hope that this committee will recommend the enactment of this law.

The general counsel of the American Association of Railroads, Mr. Carter Fort, appeared in opposition to these bills and the following statement by him clearly indicates that the standard railroads were opposed to the bills, not because of the benefits which shippers might derive from them, but because they might result in taking business from the standard roads and giving it to the short lines (Hearings on S. 1636, before subcommittee of Senate Committee on Interstate Commerce, 74th Cong, 2d sess., p. 51):

The CHAIRMAN. Is it not a fact that the shipper is entitled to have the shortest route by which he can get the most efficient service? If I wanted to ship from Montana to New York I ought to be able to ship my goods no matter whether the shipment originated on the Milwaukee or the Northern Pacific or the Great Northern. I ought to be able to have a service which would get my goods there the cheapest way and in the quickest possible time. It might depend a great deal on the character of the freight, of course. I might be shipping some perishable goods, and I might want to get it there a day sooner than the Great Northern can get it there. I am simply using that as an illustration. If a shipment were originated on the Milwaukee

and could be turned over to the Northern Pacific at some point, have I not the right to say that notwithstanding the fact that it originated on the Milwaukee I wanted it to go via the Northern Pacific or some other road so that it would get there a day sooner? It seems to me that this is the public interest that is involved.

Mr. FORT. Senator, if the Commission were limited to such considerations as that, it would be one thing; but under this bill, which uses the broad expression "public interest", the Commission might think it had the right to take into consideration, such considerations as whether a particular short line should have business thrown to it in order that it might obtain revenue. So far as good service is concerned, I am sure that no one would claim that this bill is required by or directed to any such consideration.

That Congress was particularly concerned with the shippers' interests when it was considering these through-route bills is also manifest in the legislative reports made on these bills. Thus in its report [16] on S. 1636, 74th Cong., 2d sess. the Senate Committee on Interstate Commerce said (p. 2):

Your committee feels that the shippers of the country should be given the right to use

[16] S. Rep. No. 1970, 74th Cong., 2d sess. A similar statement was made by the same committee in its report on S. 1261 at the succeeding Congress. S. Rep. No. 404, 75th Cong., 1st sess., p. 2.

> the shortest, quickest, and cheapest routes available, and a representative of the largest shippers' organization in the country appeared at the hearings to urge the passage of the bill.

The through-route bills were never passed, but S. 2009, the bill which ultimately became the Transportation Act of 1940, as reported [17] to the Senate and passed by that body, adopted from the through-route bills the same provisions contained therein which would have removed the short-haul restriction of Section 15 (4) entirely and authorized the Commission to prescribe through routes whenever found to be in the public interest.[18] See Omnibus Transportation Legislation, H. Committee Print, 76th Cong., 3d sess., p. 46. It is perfectly clear from the remarks on the floor of the Senate by Senator Wheeler, the chairman of the Senate Interstate Commerce Committee, who sponsored the bill before the Senate, that he considered the main purpose of this legislation, as it then stood, to be to benefit the shippers. He said (84 Cong. Rec. 6054-6055):

> There is no question at all that the shippers of this country have gone on record

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[17] S. Rep. No. 433, 76th Cong., 1st sess., pp. 21–22. This report specifically stated that these Sections of the bill "embody changes carried in the through routes bill, S. 1085 [76th Cong., 1st sess.], introduced by Senator Wheeler."

[18] See statement of Senator Wheeler to that effect in explaining subsequent changes made in the bill. 86 Cong. Rec. 11768.

to a very large extent as being in favor of this provision so that they will have an opportunity to take advantage of a shorter route, and will not have to go around Robin Hood's barn to ship their goods. That is all the provision means. It seems to me that if we are passing legislation in the interest of the shipper—and that is what we are seeking to do—and not in the interest of two or three great railroads, we ought to put this provision in the bill.

I know that the Pennsylvania Railroad Co. and some of the other large railroads are opposed to this provision, but regardless of whether or not they are opposed to it, they are evidencing, in my judgment, a very selfish attitude and are taking an untenable position and one to which, to a large extent, the shippers, particularly the smaller shippers are unalterably opposed.

* * * * *

What are we legislating for? Are we legislating for merely a few of the large railroads that are prosperous, or are we legislating in the interest of the general public and the shippers? If we are legislating in the interest of the shippers, and want to protect short-line railroads as well as long roads, then it seems to me this is a legitimate amendment and should be adopted.

The Senate bill would have removed the short-haul restriction entirely and the same bill, as originally passed by the House, made no change in that restriction. The present language of Sec-

tion 15 (4) (b) which, of course, retains the restriction but adds an additional exception, was adopted by the Conference Committee (H. Rep. No. 2832, 76th Cong., 3d sess., pp. 70–71). As indicated by Senator Wheeler in discussing before the Senate this amendment made by Section 15 (4) (b), the conference substitute was a "compromise provision on this point" (86 Cong. Rec. 11768).

The construction sought to be placed upon Section 15 (4) (b) by appellants becomes untenable when that Section is viewed in its proper light, as a compromise measure. To construe this language as referring solely to adequacy, economy and efficiency of transportation from the standpoint of railroad operation would be to conclude that the compromise was indeed a hollow one, so far as the shippers' interests were concerned—one that netted shippers practically nothing. Yet it seems unthinkable that in such compromise all Congressional desire to benefit the shippers, so strongly manifest in the earlier proceedings with respect to the through-route bills and S. 2009 which became the Transportation Act, would so suddenly have completely abated. On the other hand, a much likelier compromise and one which would have resulted in the gaining of the shippers' objectives, as apparent in the Senate bill, while at the same time not completely disregarding the countervailing interests of the carriers as protected by the House bill, which did not alter

Section 15 (4) as enacted by the Transportation Act of 1920, is presented if Section 15 (4) (b) is given the Commission's construction. Under this compromise, while the carriers would be required to dispense with their long haul when the Commission found that new through rates were needed to provide adequate and more efficient or more economic transportation from the shippers' standpoint, nevertheless, in return they would gain considerable protection, not furnished by the Senate bill, by virtue of the new prohibition in this Section against the prescription of through routes "for the purpose of assisting any carrier that would participate therein to meet its financial needs." Such a compromise gains much plausibility because the act prohibited was what the Commission had attempted to do in the *Subiaco* case [107 I. C. C. 523], and because it was primarily fear that, under the Senate bill, the Commission would again act on behalf of the short-line carriers which led to the opposition of the long-haul carriers to the attempts to wipe out the short-haul restriction entirely (see pp. 42–43, 45 *supra*). This construction also gains even further plausibility when it is recalled that the words "adequate and efficient transportation" finally chosen had actually been used before a Congressional committee at the hearings on one of the through-route bills by a shipper witness, from the shippers' standpoint.

II

THE COMMISSION PROPERLY CONSTRUED SECTION 15 (4) AS PERMITTING IT TO COMPARE THE PROPOSED THROUGH ROUTES NOT WITH THE PENNSYLVANIA'S DIRECT ROUTE BUT WITH ITS ROUTE THROUGH HAGERSTOWN

Appellants contend (Br. 68–72) that the Commission, in considering the proposed new routes through Hagerstown, was required, under the language of Section 15 (4) (b), to compare the proposed service on such routes not with Stickell's actually available service over the Pennsylvania route through Hagerstown, but with service on the Pennsylvania's direct route through Harrisburg, not serving Hagerstown. Appellant's contention rests on the provision in Section 15 (4) that the Commission shall not "require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad * * * which lies between the termini of such proposed through route." However, this language is found only in the portion of Section 15 (4) prescribing the general short-haul restriction. It is not found in exception (b) of that Section, under which the Commission can disregard the limitation if it finds that new routes are "needed in order to provide adequate, and more efficient or more economic, transportation." It is submitted that the provision relied upon means only

that a carrier's long haul, subject to protection, embraces the total length of its line between the termini and not just the length of its line after it has obtained possession of traffic under a prescribed through route. This is all that the *Subiaco* case [278 U. S. 269] and the second *Stickell* decision [153 I. C. C. 759] hold. Cf. Br. 69. It would be impossible for the Commission, on the complaint of a Hagerstown shipper, to determine under exception (b) whetehr a proposed route through Hagerstown would be "more efficient or more economic," either from the standpoint of service to the shipper or from the standpoint of railroad operation, if it did not compare conditions over that route with conditions over existing routes actually available to the Hagerstown shipper, where the only service available to the Hagerstown shipper is by way of Hagerstown. The construction urged by appellants seems so unreasonable that we think it must necessarily be rejected, even if required by the literal language, which it is not. *United States* v. *American Trucking Association,* 310 U. S. 534, 543.

III

THE COMMISSION'S CONCLUSION IS SUPPORTED BY ADEQUATE FINDINGS AND SUBSTANTIAL EVIDENCE

Appellants' contention (Br. 72–108) that the Commission's report does not contain adequate subordinate findings, supported by substantial ev-

idence, is largely a contention that the report lacks sufficient findings to support the conclusion required under their construction of Section 15 (4) (b). For reasons already given, we believe that the Commission properly construed Section 15 (4) (b) as authorizing it to prescribe through routes short-hauling a carrier when necessary to provide adequate and more efficient or more economical transportation from the shippers' standpoint, and as authorizing it to compare service on the proposed routes with that on the Pennsylvania's route through Hagerstown. Accepting this construction, the Commission's ultimate conclusion, in the words of the statute, that the "two routes sought are needed to provide adequate and more efficient and adequate and more economic transportation" (R. 41) is certainly supported by adequate findings and substantial evidence.

That the service on the present Pennsylvania route through Hagerstown was inadequate and inefficient so far as the shippers were concerned is indicated by the Commission's subordinate finding (R. 40) that in order to meet the demands of its customers for prompt delivery,[19] Stickell, in-

[19] The demands for prompt service by Stickell's customers and the poor rail service were given by witness Stickell as the reasons for his concern's employing this rail-truck service (R. 219–241); he did not mention as a reason, which appellants assert is the only one (Br. 99), that the grain products were not entitled to move out on the Pennsylvania under the transit tariff.

stead of being able to employ Pennsylvania's all-rail service, had shipped 640 cars from Hagerstown over the Western Maryland and the Reading to Elsmere Junction (Wilmington), thence by truck to points on the Peninsula. Appellants assert (Br. 83–84) that since such rail-truck service was over a route different from those here prescribed by the Commission, the fact that service over such route might be efficient does not indicate that service over the prescribed routes would be more efficient than that over the existing Pennsylvania route. While that may be true, the fact that Stickell was compelled by the poor service on the Pennsylvania route to employ this alternative rail-truck route does at least establish that service over the existing route was inadequate. Besides, the Commission made other findings in which it did compare service on the existing route with that on the proposed routes, which indicate that the proposed routes would be more efficient from the shipper's standpoint than the existing route. Thus it found (R. 36) that—

> Based on the fact that the out-of-line and interchange service at Hagerstown would be eliminated, on the fact that a car leaving Hagerstown via the Western Maryland late in the morning arrives at Elsmere Junction (Wilmington) on the Reading the next morning, and on information received from the Western Maryland, complainant estimates that it would save 2

> days in reaching destinations in the Del-Mar-Va peninsula if the routes sought were established.

Appellants assert (Br. 80–81) that this statement compared only the service over the respective routes from Hagerstown to destination, rather than over the entire route, and contend that such a comparison is not permitted by Section 15 (4) (b). However, there is nothing in the language of Section 15 (4) (b) which requires a showing that the proposed route must be more efficient "between the termini," even though under Section 15 (4) the Commission must consider a carrier's entire route "between the termini" in ascertaining whether a new route will short-haul it. As the District Court realistically put it (R. 98):

> * * * what Stickell is most concerned with is prompt delivery of its products. As to them there is no through movement except in the fictional sense. Of course, Stickell must count upon receiving its grain and grain products with reasonable promptness, so as to have on hand sufficient materials out of which to manufacture its products. But, practically speaking, the time taken for a carload of grain to reach the plant would not control the time when a carload of the finished product would leave the plant. It is the movement from plant to customer that is really at issue.

Moreover, it is plain that the proposed routes would be more economical to the shipper than the present from the Commission's finding (R. 40) that there would be a saving of 4.5 cents per 100 pounds (the out-of-line haul charge) on all grain and grain products moving over these routes.

The above findings thus afford a rational basis for the Commission's ultimate conclusion and they are supported by substantial evidence (R. 203, 218–219, 222, 228–231, 238–241). Clearly the question of what is needed to provide adequate and more efficient or more economic transportation is one of those numerous factual questions entrusted to the Commission's informed judgment, whose conclusion with respect thereto is binding upon the courts if supported by a rational basis and substantial evidence. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 145–146; *Barringer & Co.* v. *United States,* 319 U. S. 1, 6–7.

Appellants contend (Br. 74–77) that the Commission's above finding that the proposed routes are necessary to provide adequate service is inconsistent with the Commission's further finding (R. 36) that "There seems to be no question but that the Pennsylvania maintains sufficiently frequent service to meet all reasonable demands and that it can and does furnish adequate facilities to handle any and all grain traffic likely to be given to it at western origins for movement over

its direct routes or over its routes via Hagerstown to eastern destinations." The latter finding means merely that the Pennsylvania operates enough trains at sufficiently frequent intervals to take care of the traffic. Thus read, the finding is not inconsistent with the Commission's finding that the Pennsylvania service from Hagerstown to the Peninsula was inadequate in that it was not sufficiently swift to meet the demands of Stickell's customers for prompt delivery, making resort to other rail and truck service necessary.

There was some evidence offered by the Pennsylvania that even from the shippers' standpoint the service over the proposed routes would not be swifter and therefore more efficient than the service over the present Pennsylvania route. The Commission was entitled to accept instead the contrary testimony of Stickell in this respect, it being the Commission's function to weigh the evidence. *Western Paper Makers' Chemical Co.* v. *United States,* 271 U. S. 268, 271. Even if it could be held that the Commission erred in concluding that the proposed service was more efficient for the shipper, its order must still be sustained since it is sufficient if the new routes are needed to provide "adequate, and more efficient *or* more economic, transportation" [italics supplied], and it is indisputable that the new routes are at least needed to provide adequate and more economic service for the shipper.

There was also evidence offered by the Pennsylvania that from the carriers' standpoint the existing route was more efficient and economical from the standpoint of railroad operation than the proposed routes. Assuming this to be true, it would not invalidate the order, since, if the Commission's construction of Section 15 (4) (b) was correct, it was sufficient that the Commission found that proposed service was necessary to provide adequate and more efficient or more economic transportation for the shipper. However, it is evident from the following excerpts from the Commission's report that it properly did not consider the showing made by the Pennsylvania in these respects very convincing (R. 37, 38, 39):

> The Pennsylvania interchanges traffic with the Western Maryland at York [Pennsylvania] and Fulton Junction [Baltimore] only once every 24 hours. Consequently, the interchange tracks at those junctions are now used to near, and sometimes to full, capacity. The limited facilities and operating difficulties encountered at or near those plants are described in considerable detail. The evidence does not show, however, that those conditions are any more difficult than operating difficulties encountered at Hagerstown.
>
> It is the duty of carriers to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines. That

requirement of section 3 (3)[20] by necessary implication means that such interchange facilities must be adequate to handle all traffic that may reasonably be expected to require interchange at such points. It is no defense to a complaint seeking through routes necessary and desirable in the public interest to show that a carrier has failed to perform its duty to establish such facilities and that by reason of that neglect of duty it is more convenient from an operating standpoint for it to haul traffic 149 miles out of line. * * *

* * * * *

The Pennsylvania also contends that it is more economical to transport traffic over its direct route and its routes via Hagerstown than it would be to transport it over routes 1 and 2. As evidence thereof, it introduced a cost study based on annual reports filed with the Commission in which the formula used by the Commission's Bureau of Statistics in its Statement No.

---

[20] This Section was renumbered 3 (4) by the Transportation Act of 1940 and provides as follows:

All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. (49 U. S. C. 3 (4).)

3812 of March 1938 was followed generally with some variations. That study purports to show the cost of transporting a car of grain weighing 33 tons over the direct routes of the Pennsylvania, its routes via Hagerstown, routes 1 and 2, and other routes between selected points. Among other things, it purports to show that, based on the Pennsylvania's average system costs and the average system costs of the other carriers which would participate in routes 1 and 2, it costs less to transport a car of grain over the Pennsylvania's routes via Hagerstown than it would be to transport it over routes 1 or 2. The Pennsylvania does not contend that the study shows the cost of handling grain to the destinations under consideration but states that it furnishes a "reasonably reliable basis for determining the relative costs of transportation." Even as to relative costs, its value, if any, is limited to average system costs on all less-than-carload and carload freight, while here we are dealing with a heavy loading commodity moving comparatively long distances in well-defined channels. * * *

* * * * *

Yet the Pennsylvania, while contending that from the standpoint of operating conditions and operating costs its routes via Enola yard [near Harrisburg] and Hagerstown are more efficient and economical than other routes via Hagerstown, inconsistently

> contends and introduced considerable evidence to show that its 4.5-cent out-of-line charge, approximately 17 percent of the prescribed rate from Chicago to Salisbury [Maryland], in addition to the through rates is justified by the out-of-line haul. The justification for a special charge for out-of-line hauls is that routes that require such additional services are not comparable with and are less economical than routes that do not.

Finally, it cannot be said (cf. Br. 84–86) that the Commission in referring, as above indicated, to Section 3 (3), based its decision on that Section or purported to make any order under that Section against the Pennsylvania to compel it to provide reasonable and proper facilities for interchange at York and Fulton Junction. The Commission merely referred to Section 3 (3) as showing that the Pennsylvania could not properly claim that the new routes would be less efficient because of the inadequacy of interchange facilities at those points, in view of the obligation of the carrier to provide proper facilities. The Commission, of course, in any proceeding, whether or not counsel direct its attention to any particular provisions of the Act, is under an obligation to consider of its own motion the effect of any pertinent provision of the Act. See the National Transportation Policy and Section 12 (1). If the Commission intends to make any order actually

requiring the Pennsylvania to improve its facilities, it will certainly give the carrier notice and an opportunity to be heard in that connection. See Sections 1 (14) (a) and 15 (3).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

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JANUARY 1945.

APPENDIX A

Part I of the Interstate Commerce Act, as amended by the Transportation Act of September 18, 1940, 54 Stat. 899.

Section 1 (3) (a) provides in part:

> * * * The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. (49 U. S. C. 1 (3) (a).)

Section 3 (4) provides:

> All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in

this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III. (49 U. S. C. 3 (4).)

Section 15 (3) provides:

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without

regard to the provisions of paragraph (4) of this section. (49 U. S. C. 15 (3).)

Section 15 (4) provides:

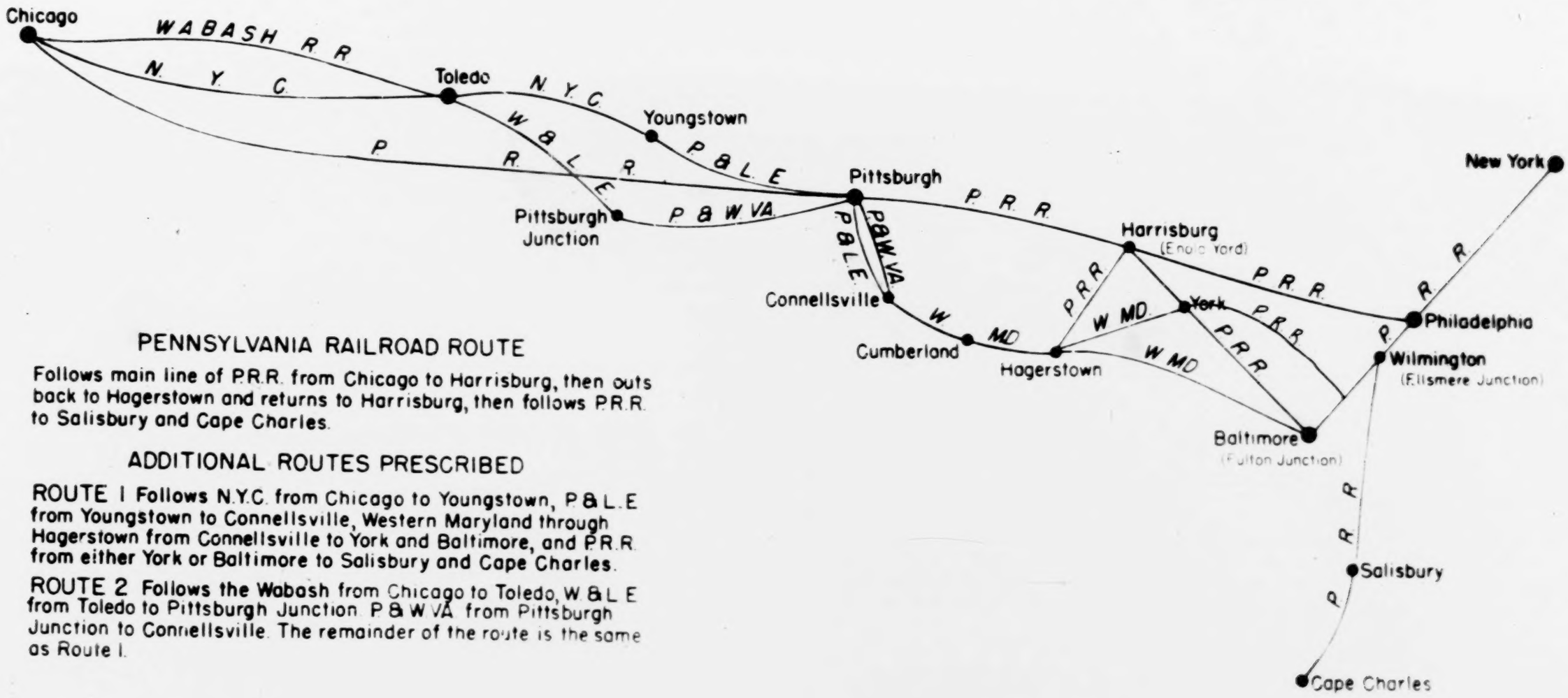
In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or

other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest. (49 U. S. C. 15 (4).)

U. S. GOVERNMENT PRINTING OFFICE 1945

APPENDIX B

MAP SHOWING ROUTES FROM CHICAGO THROUGH HAGERSTOWN, MD. TO DEL-MAR-VA PENINSULA POINTS (SALISBURY, MD. AND CAPE CHARLES, VA.)



PENNSYLVANIA RAILROAD ROUTE

Follows main line of P.R.R. from Chicago to Harrisburg, then outs back to Hagerstown and returns to Harrisburg, then follows P.R.R. to Salisbury and Cape Charles.

ADDITIONAL ROUTES PRESCRIBED

ROUTE 1 Follows N.Y.C. from Chicago to Youngstown, P.& L.E from Youngstown to Connellsville, Western Maryland through Hagerstown from Connellsville to York and Baltimore, and P.R.R. from either York or Baltimore to Salisbury and Cape Charles.

ROUTE 2 Follows the Wabash from Chicago to Toledo, W.& L.E from Toledo to Pittsburgh Junction P.& W.VA. from Pittsburgh Junction to Connellsville. The remainder of the route is the same as Route 1.

McCloskey 1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 182

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, D. A. STICKELL & SONS, INC.,

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF OF D. A. STICKELL & SONS, INC.

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Chicago (3), Illinois,

January 3, 1945.

THE DUNHOOP MAYFLOWER PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

Table of Cases Cited.

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THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND D. A. STICKELL & SONS, INC.,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF OF D. A. STICKELL & SONS, INC.,

OPINIONS BELOW.

The opinion of the specially-constituted District Court for the District of Maryland, *Pennsylvania R. Co.* v. *United States*, 54 F. Supp. 381, appears in the Record at page 77, and its final decree at page 102.

The report of the Interstate Commerce Commission, Division 2, *D. A. Stickell & Sons, Inc.* v. *Alton R. Co.*, 255 I. C. C. 333, is set forth in the Record at page 27, and its accompanying order at page 41.

JURISDICTION.

The jurisdiction of this Court is invoked in accordance with the authority contained in U. S. Code, Title 28, Sections 47a and 345, for the taking of a direct appeal to this Court from the final decree of a United States District Court, made pursuant to the provisions of U. S. Code, Title 28, Sections 41 (28), 43-48, and Title 49, Section 17 (9), refusing to enjoin, set aside, annul, or suspend an order of the Interstate Commerce Commission. The final decree of the District Court was entered on March 22, 1944 (R. 102). Petition for appeal was presented and allowed on May 15, 1944 (R. 108). Probable jurisdiction was noted by this Court on October 9, 1944 (R. 477).

STATUTE INVOLVED.

The statute here involved is the Interstate Commerce Act, as amended, herein termed the Act, and particularly the provisions thereof which empower the Interstate Commerce Commission to prescribe through routes. 49 U. S. C. Sec. 15(3) and (4). More specifically the case involves the interpretation and application of clause (b) as added to paragraph (4) by the Transportation Act of 1940. (54 Stat. 911-912). Paragraphs (3) and (4) of Section 15, and Section 3(4) referred to in the Commission's decision, are set forth below:

Paragraphs (3) and (4) Sec. 15.

"(3) *The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carrier subject to this part,* or by carriers by railroad subject to this part and common

carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section. (Italics supplied.)

"(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, *or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate and more efficient or more economic, transportation: Provided, However, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates*

applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest." (The portion in italics is the amendment contained in the Transportation Act of 1940.)

The decision of the Commission also refers to Interstate Commerce Act as amended by Transportation Act of 1940, September 18, 1940, 54 Stat. L. 898 (903-904).

Section 3 (4):

"(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

STATEMENT OF THE CASE.

The Complainant before the Interstate Commerce Commission in *D. A. Stickell & Sons, Inc.* v. *Alton R. R. Co., et al.* (255 I. C. C. 333) (R. 27) is located at Hagerstown, Maryland, where it is engaged in milling and mixing of grain, grain products and grain by-products, and in the manufacture of mixed live stock and poultry feeds. Complainant's mill is located directly upon the rails of the Western Maryland railroad, a direct west to east route passing through Hagerstown. Complainant draws its raw materials generally from territories of production in the West and Middle West. After the manufacturing process at Hagerstown, it ships its products to points of consumption east of Hagerstown. The destination points here involved are stations on the Pennsylvania railroad east of York, Pennsylvania, and Fulton Junction (Baltimore), Maryland, and between New York, New York and Cape Charles, Virginia, principally in what is known as the Del-Mar-Va region (R. 217).

The complaint before the Commission sought the relief that the Commission is empowered to administer under Section 15 of the Act to Regulate Commerce. That Section authorizes the Commission under certain conditions to prescribe through routes "whenever deemed by it to be necessary or desirable in the public interest" for the movement of interstate commerce.

The complaint was fully heard by the Commission, printed briefs were filed, and the case was orally argued before Division 2 of the Commission. Thereafter the Division unanimously entered the following finding:

"We find that the two routes sought are necessary

and desirable in the public interest and that they are needed to provide adequate and more efficient and adequate and more economical transportation and should be established, subject to the lowest through rates contemporaneously maintained on the same commodities from the same origins to the same destinations over the direct routes of the Pennsylvania, or over routes in which the Pennsylvania is a participating carrier via Enola Yard near Harrisburg (R. 41).

"An appropriate order will be entered."

THE COMMISSION PRESCRIBED THE FOLLOWING ROUTES.

"(1) From the markets and origins in central territory on The New York Central Railroad Company and its connections other than the Pennsylvania via New York Central to Youngstown, Ohio, Pittsburgh & Lake Erie to Connellsville, Western Maryland to Hagerstown, thence Western Maryland to York or Fulton Junction, and the Pennsylvania beyond; and (2) from the same markets and origins on the Wabash Railway Company and its connections other than the Pennsylvania in central territory via the Wabash to Toledo, Ohio, The Wheeling and Lake Erie Railway Company to Pittsburgh Junction, Ohio, Pittsburgh & West Virginia to Connelsville, Western Maryland to York or Fulton Junction, and the Pennsylvania beyond." (R. 31.)

Thereafter, certain of the railroads petitioned the Commission for reargument and reconsideration, to which petition the complainant replied. The full Commission, upon consideration of said petition and reply, unanimously denied said petition.

Thereupon, the appellants herein filed in the United States District Court for the District of Maryland their petition (R. 3) for an interlocutory and final injunction setting aside, annulling and suspending said order of the Commission, principally upon the ground that the Commis-

sion had erroneously administered Section 15(4)(b) of the Statute set forth hereinbefore, in holding that Clause (b) must be interpreted to mean "adequate and more efficient and more economic transportation" from the shipper's as well as the carrier's standpoint.

No testimony was taken before the District Court, but the case was presented on the record of the proceedings before the Commission which was introduced in evidence (R. 76).

In a carefully considered opinion of twenty-five pages, the District Court concluded that the exception embodied in clause (b) "must be interpreted to mean 'adequate, and more efficient and more economic, transportation' from the shipper's as well as from the carrier's standpoint, and that, therefore, the Commission has authority under this clause, to consider and weigh the relative importance of all factors affecting both the shipper and the carrier" (R. 94).

The Court below further concluded that the Commission applied clause (b) in a manner supported by substantial evidence, that such application violates no constitutional rights of the petitioning carriers, and that the petition must be dismissed (R. 102).

Appellants seek an order from this Court reversing the final decree of the Court below and setting aside the Commission's order on the ground, principally, that the issue involved is the proper construction and meaning of clause (b) of Section 15 (4) of the Act, and that the interpretation given this clause by the Commission (See just above), which was sustained by the Court below, is improper and constitutes error of law, in that clause (b) should be applied exclusively in favor of the railroads.

To avoid needless repetition, such additional facts as are necessary to the Argument will be included therein with appropriate record references.

SUMMARY OF ARGUMENT.

I.

THE COMMISSION'S ORDER, WHICH WAS SUSTAINED BY THE DISTRICT COURT, WAS BASED UPON A SOUND ADMINISTRATION OF THE LAW UPON THE FACTS BEFORE IT, AND WAS WITHIN ITS STATUTORY POWER.

Broad discretion is vested in the Commission in a formal proceeding before it to establish through routes whenever deemed by it to be necessary or desirable in the public interest, Section 15(3). The limitation as to short-hauling in Section 15(4), which provides that a carrier may not be required without its consent to embrace in such route substantially less than the entire length of its railroad which lies between the termini of such proposed through route, is immediately followed by Section 15(4)(b) which must be construed in connection with Section 15(3). Section 15(4)(b), coupled with Section 15(3), empowers the Commission to prescribe in the public interest through routes needed by the public in order to provide adequate and more efficient and more economic transportation service. These two provisions cannot be separated, and they together bring the Commission's order herein well within the Commission's statutory power. Moreover, the Commission's exercise of that unit of power in this case is strongly supported by the plain wording of the two sections, and also by the whole purpose and intent of Congress in enacting clause (b), as shown by the proceedings before Congress.

II.

THE COMMMISSION'S ORDER, WHICH THE DISTRICT COURT SUSTAINED, IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Transportation of mixed feed in interstate commerce requires direct, prompt and efficient service. Such service is not rendered upon the existing routes, embracing a lengthy back-haul and delayed service, for which unnecessary and forced service railroads are compelled to assess a substantial extra charge. The routes ordered by the Commission obviate this unnecessary and forced back-haul service which this complainant does not need and does not want.

Out-of-line and back-haul transportation service has been uniformly condemned by the Commission as wasteful, contrary to the national transportation policy and wholly incompatable with present urgent needs for conversation and best use of our transportation facilities.

III.

THE DISTRICT COURT CORRECTLY DECIDED THAT THE COMMISSION'S ORDER IS SUPPORTED BY PROPER FINDINGS.

This subject is briefly referred to hereinafter, but is amply covered in the brief on behalf of the Government.

ARGUMENT.

I.

THE COMMISSION'S ORDER WHICH WAS CORRECTLY SUSTAINED BY THE DISTRICT COURT, WAS BASED UPON A SOUND ADMINISTRATION OF THE LAW UPON THE FACTS BEFORE IT, AND WAS WITHIN ITS STATUTORY POWER.

The Commission proceeded under authority given it by Section 15(3) of the statute as follows:

> "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part." (The complete section is set forth hereinbefore on page 2.)

It is important to note the broad discretion thus vested in the Commission, and especially that it is exercised "*in the public interest,*" and "whenever deemed by it to be necessary." In considering the limitations in the statute upon the exercise of the above power, the broad power itself should never be lost sight of—this is all important.

The power above described was limited by Section 15(4) by the so-called "short-haul" provision, which provided that a carrier could not be required,

> "without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route." (The complete section is set forth hereinbefore at page 2.)

The administrative power of the Commission under Section 15(3) and the limitation upon that power under Sec-

tion 15(4) came before this Court in *United States* v. *Mo. Pac. Ry.*, 278 U. S. 269, where it was stated by the Court:

> "The provision of this paragraph which forbids the commission in prescribing a through route to embrace in that through route substantially less than the entire length of a carrier's railroad which lies between the termini of such route can not be construed as covering only such routes as will deprive the carrier of its long haul after it has obtained possession of the traffic."

In deciding that the then wording of Section 15(4) could not be construed as covering only such routes as will deprive a carrier of its long haul *after it has obtained possession of the traffic*, the court stated at page 278 as follows:

> "Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority in respect of the establishment of through routes."

Subsequently, by the Transportation Act of 1940, the so-called "short-haul" provision was itself limited so that a carrier may not be short-hauled.

> "(b) Unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation." (The complete section is printed hereinbefore on page 3.)

It is clear from the foregoing that the amendment has now corrected the "inconvenience or hardship" referred to by the Supreme Court, and following the suggestion of the court, Congress has decided that "the Commission should have more authority in respect of the establishment of through routes." (P. 278 of Court's decision.)

Under the amended Section 15(4) the Commission now has authority to remove this "inconvenience and hardship" to the public, including this complainant, specifically mentioned by the Court at page 282 of its decision.

The whole contention of the appellants may be summed up in their claim that the Commission was in error when it stated:

> "We interpret that exception (Paragraph (b) of Section 15(4)) to mean adequate and more efficient and more economic from the public or shippers' as well as the participating carriers' standpoint."

The contention of the appellants is that Paragraph (b) of the amendment applies exclusively for the sole benefit of the carriers, and that the Commission is wrong in giving any consideration whatever to the public interest. Bearing in mind that the Commission is here administering its power under Section 15(3) to establish through routes "deemed by it to be necessary or desirable" in the public interest, the Commission was justified, and it may be said that the act required that it be administered in the "public or shippers' interest as well as that of the participating carriers". (R. 40.) Moreover, when a public statute of the United States is enacted by Congress in the exercise of its legislative powers, requiring the Commission to administer said power "in the public interest," it requires some fortitude for any one to argue in this day and age that "public interest" includes himself and excludes others.

Section 15(4)(b) vests in the Commission the power to find upon the record before it whether the through route proposed to be established is needed to provide "adequate" transportation service. The statute does not say adequate facilities. These are two very different words. There may be adequate facilities such as sufficient cars in which to load the traffic, and connecting rails over which the cars may move to destination. But this may not constitute adequate transportation service, as the District Court clearly points out. Especially upon the facts before the Commission comparing a round-about, back-haul service of transportation, with a direct through service of transportation.

The transportation of the mixed feed here involved frequently requires prompt and speedy delivery as will be pointed out in some detail hereinafter.

The statute further vests in the Commission the power in its discretion to find upon the record before it whether the through route proposed to be established is needed to provide "more efficient or more economic transportation." In administering this provision the Commission makes the following pointed statement:

> "Yet the Pennsylvania, while contending that from the standpoint of operating conditions and operating costs its routes via Enola Yard and Hagerstown are more efficient and economical than other routes via Hagerstown, inconsistently contends and introduced considerable evidence to show that its 4.5-cent out-of-line charge, approximately 17 percent of the prescribed rate from Chicago to Salisbury, in addition to the through rates *is justified by the out-of-line haul. The justification for a special charge for out-of-line hauls is that routes that require such additional services are not comparable with and are less economical than routes that do not.*" (A. 39.) (Italics supplied.)

In other words, the existing route is so uneconomical and so inefficient that the railroads are compelled to recognize these outstanding facts themselves by adding on an extra charge of 17 per cent in the through rates to cover these unnecessary services not needed by the complainant, and not rendered on the direct routes ordered by the Commission.

The Commission, in the exercise of its authority, is directed to "give reasonable preference in any particular case to the carrier by railroad which originates the traffic", so far as is consistent with the public interest (Sec. 15(4)(b). It will be noted that on the prescribed routes, the traffic is not originated by the Pennsylvania. The District Court calls special attention to this significant change in the Act in support of the Commission's decision. (R. 89.)

OUT-OF-LINE AND BACK-HAUL TRANSPORTATION UNIFORMLY DISAPPROVED BY THE COMMISSION AS INEFFICIENT AND WASTEFUL.

The decisions of the Commission condemning, as uneconomic, wasteful and inefficient, back-haul transportation, such as exists on the Pennsylvania route here involved, are numerous and are found throughout the Commission's decisions running back through the years. A few of these decisions are listed below: *F. W. Stock & Sons* v. *Lake Shore & M. S. Ry. Co.*, 31 I. C. C. 150; *Wool Rates Investigation*, 1923, 91 I. C. C. 235; *Grain and Grain Products*, 164 I. C. C. 619; *Out-of-route and Back-haul Charges*, 169 I. C. C. 105; *Malta Mfg. Co.* v. *Baltimore & O. R. Co.*, 191 I. C. C. 93; *Pillsbury-Astoria Flour M. Co.* v. *Great Northern Ry. Co.*, 198 I. C. C. 642; and *Traffic Bureau, Lynchburg C. of C.* v. *Norfolk & W. Ry. Co.*, 237 I. C. C. 408.

In *F. W. Stock & Sons* v. *Lake Shore & M. S. Ry. Co.*, *supra*, it was said:

> The theory of transit is service at some point between the points of origin and destination of the traffic, and in the direction of the movement of the traffic to the point of final destination. A back-haul is contrary to the purpose of transit and should generally be permitted only to meet unusual situations, and when to do so does not result in unjust discrimination or other violations of law.

There is no unusual situation here existing necessitating this substantial back-haul of 148 miles. On the contrary, every consideration of economy and efficiency condemns it, and justifies the direct routes right straight throught Hagerstown from West to East on the Western Maryland.

In a recent case, *Oklahoma Grain via Wichita to Memphis*, 248 I. C. C. 767, the Commission again disapproves

back-haul service as wasteful, and emphasizes its evil effects in the present urgent need for conservation and best use of our transportation facilities, as follows:

> The movement of traffic for long distances in a direction opposite to final destination, such as here proposed, is, of course, wholly incompatible with present urgent needs for conservation and best use of our transportation facilities.

The Commission there concludes that back-hauls result in "wasteful transportation contrary to the mandate of Section 15a." Moreover, the Commission adds that, "The foregoing provisions of the Act are construed and applied in accordance with the national transportation policy." Therefore, it is quite apparent that the reference to the "national transportation policy" by appellants as being served by forcing traffic over a long back-haul wasteful route rests upon a clear misconception of that Act as correctly administered by the Commission.

> "The purpose of transit is to permit service at some point *between origin and destination* of traffic and in the general direction of the movement of the traffic. *A back haul is contrary to this purpose.*" (Italics supplied.)
>
> (*Pillsbury-Astoria Flour Mills Company* v. *Great Northern Railway Company, et al.*, 198 I. C. C. 642, at page 646.)

> "Furthermore, the theory of transit is service at some point between the points of origin and destination of traffic and in the direction of the movement of the traffic to the point of final destination, and transit involving back-haul service should not be required to be established except where it is clearly shown that the failure to do so results in unjust discrimination or other violations of the law. *Stock & Sons* v. *L. S. & M. S. Ry. Co.*, 31 I. C. C. 150."
>
> (*Wool Rates Investigation*, 1923, 91 I. C. C. 235, at page 284.)

No transportation practice has been more uniformly disapproved by the Commission throughout the years as wasteful, inefficient and uneconomic, than back-hauls, of which the back-haul here involved is a glaring example.

THE COMMISSION'S ADMINISTRATION OF THE STATUTE IS SUPPORTED BY THE LEGISLATIVE HISTORY.

The legislative history of the amendment (Section 15 (4)(b)) to the statute is being covered in the brief on behalf of the Government. Mr. Howard Stickell, an officer of the Complainant before the Commission in the instant case testified before the Committees of Congress at the time the amendment was under consideration.

The hearings on these bills evince that shippers were deeply concerned with them and strongly supported their passage. Thus, Charles R. Seal, acting chairman of the National Industrial Traffic League, one of the largest shippers' organizations, testified as follows at the hearings before the subcommittee of the House Interstate and Foreign Commerce Committee on S. 1261 (75th Cong., 2nd session, pp. 39-40):

> From the standpoint of shippers, it seems to me, power on the part of the Commission to prescribe through routes is almost, if not equally as important, as the power to prescribe reasonable rates.

It is highly significant, also, that in the following colloquy at the same hearing he used words "adequate and efficient transportation," now found in Section 15(4) from the shippers' viewpoint (p. 41):

> Mr. Holmes: Your organization is primarily interested in cheaper transportation, is that right?
>
> Mr. Seal: No, we are primarily interested in adequate transportation.
>
> Mr. Holmes: Well that also applies to cheaper transportation.

> Mr. Seal: Not necessarily. We would not want—I think I may say—although this is partly a personal view—we would not want cheap transportation at the sacrifice of adequate and efficient transportation.

Furthermore, Mr. Howard K. Stickell, president of the present complainant before the Commission appeared at the same hearing in support of the bill and said (p. 42):

> I bring these facts to your attention simply to show you the effect which the present law is having on our business. If it had not been for the Subiaco decision, which caused the Interstate Commerce Commission to have to change its position, we would now be, and would have been for many years, able to compete in a much wider territory, and would have been able to develop our business to a much greater extent than has been possible.
>
> It is our hope that this committee will recommend the enactment of this law.

The amendment to Section 15(4) resulted from the request of the Commission itself, duly made under Section 21 of the Act, which requires the Commission's recommendation as to "such additional legislation as the Commission may deem necessary." This amendment was necessary to remove the "inconvenience and hardship" to the public referred to by the Supreme Court in *U. S.* v. *Missouri Pac. R. Co.*, 278 U. S. 269, where this very Hagerstown route is cited by that Court. (P. 282.)

While the bill was being debated on the floor of the Senate (May 24, 1939, 84 Cong. Rec. 6054-5), Senator Wheeler being the Chairman of the Senate Committee on Interstate Commerce and the sponsor of the bill stated:

> "There is no question at all that the shippers of this country have gone on record to a very large extent as being in favor of this provision so that they will have an opportunity to take advantage of a shorter route, and will not have to go around Robin Hood's barn to

ship their goods. That is all the provision means. It seems to me that if we are passing legislation in the interest of the shipper—and that is what we are seeking to do—and not in the interest of two or three great railroads, we ought to put this provision in the bill.

"I know that the Pennsylvania Railroad Co. and some of the other large railroads are opposed to this provision, but regardless of whether or not they are opposed to it, they are evidencing, in my judgment, a very selfish attitude and are taking an untenable position and one to which, to a large extent, the shippers, particularly the smaller shippers, are unalterably opposed."

• • • • •

"Mr. Wheeler. What are we legislating for? Are we legislating for merely a few of the large railroads that are prosperous, or are we legislating in the interest of the general public and the shippers? If we are legislating in the interest of the shippers, and want to protect short-line railroads as well as long roads, then it seems to me this is a legitimate amendment and should be adopted."

In the light of the foregoing it is apparent that the interpretation of the Commission above set forth and sustained by the District Court, is a faithful administration of Section 15(4) in the public interest and conforms to the will of Congress, as well as the simple wording of the Act itself. Any other interpretation of the amendment would render its enactment a useless effort.

The legislative history of the enactment of Clause (b) furnishes cogent evidence that Congress did in fact empower the Commission in the public interest, to prescribe new through routes which would short-haul a non-consenting railroad, in the exercise of its statutory discretion that the proposed routes will operate in the public interest by furnishing adequate, more efficient and more economical

transportation than the existing route, and that the order is therefore within the Commission's statutory authority.

THIS COURT HAS HELD THAT THE COURTS ARE NOT AT LIBERTY "TO PRESCRIBE GENERAL ATTITUDES" UPON THE COMMISSION IN THE EXERCISE OF DISCRETION "LEFT TO IT" BY STATUTE.

The well-ascertained law is that courts are without power to weigh the evidence introduced before the Commission, or pass upon the soundness of the Commission's conclusions. The decisions upholding the foregoing principle are many and we shall only refer to a few of the recent cases. The only instances in which the courts will review findings of fact by the Commission are where the Commission has acted arbitrarily or without evidence to support its conclusion, or has transcended its constitutional or statutory powers. (*Standard Oil Co.* v. *United States*, 283 U. S. 235; *Interstate Commerce Commission* v. *Delaware, L. & W. Ry. Co.*, 220 U. S. 235; *United States* v. *Louisville & N. R. R. Co.*, 235 U. S. 314; *Proctor & Gamble* v. *United States*, 225 U. S. 282, at pages 296 to 298.)

> "It is not for the courts to weigh the evidence introduced before the Commission. And the soundness and reasoning by which the conclusions are reached, or the wisdom of the calculation which prescribes the rates, are matters which are left by Congress to the Commission as the administrative 'tribunal appointed by law and informed by experience.' *Akron, C. & Y. Ry. Co.* v. *United States*, 22 Fed. (2d) 199. (Int. Com. Acts Ann. Vol. 4, page 3170.)
>
> "In a suit to set aside an order of the Commission, where the evidence before the Commission was conflicting and ample to sustain the findings, they are conclusive. *Louisville & N. R. Co.* v. *United States*, 245 U. S. 463, 62 L. Ed. 400, 38 Sup. Ct. Rep. 141, affirming 225 Fed. 571; *United States* v. *Louisville & N. R. Co.*, 235 U. S. 314, 59 L. Ed. 245, 35 Sup. Ct.

Rep. 113, reversing *Louisville & N. R. Co.* v. *United States*, 197 Fed. 58.

"Although the evidence would have warranted a different finding and the first report of the Commission was to the contrary, to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this can not be done. *Manufacturers' Ry. Co.* v. *United States*, 246 U. S. 457, 62 L. Ed. 831, 38 Sup. Ct. Rep. 383." (Int. Com. Act Ann. Vol. 4, page 3169.)

Whether a route is needed in the public interest is one of those questions of fact that has been confided by Congress to the judgment of the Commission. Its decisions, made the basis of administrative orders operating *in futuro*, are not to be disturbed by courts except upon a showing that they are unsupported by evidence, were made without hearing, exceed constitutional limits, or for some reason amount to abuse of power. (*Manufacturers' Ry. Co.* v. *United States*, 246 U. S. 457, 62 L. Ed. 831, 38 Sup. Ct. Rep. 383. Int. Com. Acts Ann. Vol. 4, page 3168.)

In a recent case (December 6, 1943) a District Court set a Commission's order aside. (*I. C. C. et al.* v. *Hoboken Manufacturers' R. R.*, 64 Sup. Ct. 159.) The Court said, reversing the District Court, that the Commission's determination "is an administrative finding which, if supported by evidence is conclusive on the Courts."

In *Mississippi Valley Barge Co.* v. *United States* (292 U. S. 282, 286) the Supreme Court holds:

"The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

In *I. C. C.* v. *Inland Waterways Corp.* (319 U. S. 671, 691) the Supreme Court in reversing a District Court, holds:

"Our function does not permit us either to pre-

scribe or approve rates, and our decision carries no implication of approval of any rates here involved. *Nor are we at liberty to prescribe general attitudes the Commission must adopt towards the exercise of discretion left to it rather than to courts.* We decide only whether the Commission has acted within the power delegated to it by law. We are of opinion that it has and that the decision of the court below must be

Reversed." *(Italics supplied.)*

In view of the somewhat novel argument of appellants, seeking to impose meticulous limitations upon the Commission in the exercise of its discretion in administering the broad powers conferred upon it by Section 15 of the Act, the expression of the Court in the decision cited above, that the Courts are not at liberty to "prescribe general attitudes" upon the Commission in the exercise of its discretion "left to it" by the statute, seems peculiarly applicable in this case.

We shall point out hereinafter that the decision and order in the case here before the Court contain none of the infirmities recited in the foregoing decisions, and that therefore the decision of the District Court should be affirmed.

The reference in the Commission's decision to Section 3(4) of the statute, which section is printed hereinbefore under "statutes involved," is correctly disposed of by the District Court, as follows:

> "What the Commission said on this point is as follows (255 I. C. C. at 341): 'It is the duty of carriers to afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and connecting lines. That requirement of Section 3(4) by necessary implication means that such interchange facilities must be adequate to handle all traffic that may reasonably be expected to require interchange at such points. It is no defense to a com-

plaint seeking through routes necessary and desirable in the public interest to show that a carrier has failed to perform its duty to establish such facilities and that by reason of that neglect of duty it is more convenient from an operating standpoint for it to haul traffic 149 miles out of line.' This is a correct interpretation of the law." (R. 101.)

II.

THE COMMISSION'S ORDER, WHICH THE COURT BELOW CORRECTLY SUSTAINED, IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

It will be noted from the Statutory provisions here involved that no attack has been made upon any rates or back-haul charges, either that they are unreasonable in violation of Section 1 of the Act, or that they are unjustly discriminative under Section 3 of the Act. *The repeated claim or inference of appellants to the contrary rests upon a clear misapprehension of the very nature of this case.*

The shipper accepts the existing through rates applying upon this traffic from the origin of the raw materials, grain and grain products, in the region of production in the Middle West, to the final destinations on the Pennsylvania Railroad in the Del-Mar-Va region. These rates are the same in amount as the rates paid by Complainant's competitors located at various points on the through routes of transportation from the West to the East upon which rates there is a substantial movement of mixed feed. (R. 203.)

The order of the Commission simply requires through movement of traffic from the Western producing points, directly through Hagerstown on the Western Maryland Railroad and on to the Del-Mar-Va region served by the Pennsylvania, over the two routes specified in its order.

at the going through rates that have applied generally on similar traffic for many years. In other words, the order merely requires through efficient and direct transportation service, the primary function for which these railroads were organized and authorized to perform.

THE TRANSPORTATION OF MIXED FEED IN INTERSTATE COMMERCE REQUIRES DIRECT, PROMPT AND EFFICIENT SERVICE.

The manufacture and distribution of mixed feed is a volume or quantity operation. Hence, the principal items entering into the delivered cost are the raw materials, grain and grain products, which must constantly move in carloads, and the freight charge upon relatively heavy tonnage. The margin of profit upon a ton of feed is very small, and therefore, the addition of but a few cents per 100 pounds to the going through rate to a given market prevents the sale against a competitive movement at the going through rate. (R. 79.)

For example, the Del-Mar-Va region here involved can be and is served by numerous feed manufacturers at the going through rate located at many points such as Buffalo, New York, Fort Wayne and Indianapolis, Indiana, Cincinnati, Toledo, Cleveland and Akron, Ohio, Pittsburgh, Lancaster and York, Pennsylvania (R. 32), without any additional charges being added to the through rates. (R. 203.)

Hagerstown is well located for the manufacture of mixed feeds on the through routes, between the grain producing regions of the West and the consumers of the East. Complainant, for many years, has had through routes from the West to the East reaching the regions East of Hagerstown, as far as New England on the through rates without any back-haul charge because there is no back-haul. This

traffic flows over the very routes from the West through Hagerstown on the Western Maryland Railroad here covered by the Commission's order in this case. (R. 217.)

> "A through route is an arrangement, expressed or implied, between connecting railroads for continuous carriage from a point on the line of one to a destination on the line of the other." *Quanah, A. & P. Ry. Co.* v. *Atchison, T. & S. F. Ry. Co.*, 211 I. C. C. 389, 390-391.

Transit arrangements are maintained by the several railroads at Hagerstown whereby complainant receives its inbound materials, mixes them into feed, and ships its products to destination at the same rate (plus a transit charge) as if there had been a through shipment of the manufactured product direct from origin to destination. This is the usual transit practice generally employed in the transportation of grain, grain products and mixed feed throughout the country.

One of the natural markets for complainant should be the Del-Mar-Va region lying immediately East of Hagerstown. This region is served only by the lines of the Pennsylvania railroad, which will not let complainant into said markets unless the tonnage moves into and out of Hagerstown over its expensive back-haul route through Harrisburg hereinbefore described, including 74 miles out of line or 148 miles for the back-haul, plus the extra switching and other services. For the round-about service via its route, to compensate it for this service, wholly unnecessary on the two routes prescribed by the Commission, an additional charge si made by the Pennsylvania of 17 per cent on top of the going through rates.

The complainant is simply asking for what his competitors already have (R. 207, 210, 213). He merely wants to be "on the same basis" with what is freely extended to his competitors (R. 220). The proposed routes will make

"quicker time and the service is more efficient and economical" (R. 222, 225, 228). The net saving time will be two days. (R. 95, 239.)

In order to get away from this wasteful and inefficient service above described, the order of the Commission prescribes the two direct routes from the producing regions of the West directly through Hagerstown on the Western Maryland and on East to the the Del-Mar-Va region. The Commission describes these direct routes as follows:

> "The routes sought up to Hagerstown are well established and generally accepted as reasonable by shippers and the carriers parties thereto to points in eastern territory. There is no showing or contention that those routes would be less economical as parts of the through routes sought to destinations considered on the Pennsylvania than to destinations on the other carriers in eastern territory. The routes sought in connection with the Pennsylvania (in the Del-Mar-Va region) would not only not result in any cross hauling or wasteful transportation, but they would eliminate a 149-mile out-of-line haul and two switching interchanges at Hagerstown and would relieve the Pennsylvania from the expense of maintaining transit and absorbing the switching charges at Hagerstown. The Western Maryland would bear all the transit and switching expenses at that point."

The Western Maryland did not oppose the complaint. (R. 28.)

This case presents railroad regulation at its best. Here is a shipper in interstate commerce who does not complain of any rate or any charge. He simply seeks reasonable through service at the going rates now open to competitors. This complaint is aptly described by the Supreme Court in *Peoria Ry.* v. *U. S.*, 263 U. S. 528 at 535 where the Court says that to receive and transport shipments coming from a connecting carrier is a *"Primary Duty of a Carrier."* (Italics supplied.)

The Pennsylvania controls the delivering points, and insists upon forcing this traffic over its back-haul route so that it can collect the entire through rate, plus its back-haul charges for a back-haul service that complainant does not need and does not want.

The amended Section 15(4), enacted at the request of the Commission, is especially designed to remove what the Supreme Court describes as the "*inconvenience and hardship*" *to the public*, in *United States* v. *Mo. Pac. R. Co.*, 278 U. S. 269.

THE RELIEF SOUGHT BEFORE THE COMMISSION WAS FOR DIRECT, PROMPT, EFFICIENT SERVICE.

Not only is the present back-haul route uneconomical and inefficient in that its unnecessary round-about service requires a 17 per cent increase in the through rates to compensate the Pennsylvania for such service, but this route has the further infirmities pointed out by the Commission in its decision (R. 36, 40), such as adding two days' time in reaching destinations. That "in order to meet the demands of customers for prompt delivery complainant shipped 640 carloads from Hagerstown over the Western Maryland and the Reading to Elsmere Junction, thence by truck to points on the Del-Mar-Va peninsula." (R. 219, 222, 224, 228, 241.)

Since the record before the Commission was closed, the claim is made that this substantial movement by truck, made solely in order to secure prompt service demanded by consumers, was due to a lack of transit tonnage at Hagerstown upon which to continue the rail service. This claim has been improperly injected into this case since the record before the Commission was closed. Therefore, we are not called upon to answer it. However, the transit records of complainant show that via the Pennsylvania

route there was always a large surplus of transit rail billing when these 640 carloads were shipped by truck. This truck movement was purely to avoid the slow service over the inefficient back-haul route. The claim of appellants is therefore wholly erroneous.

The mixed feed business requires prompt and efficient delivery to consumers and the complainant is here seeking the most direct routes to save mileage and to make quick deliveries (R. 241). The assertion that complainant is merely seeking to avoid back-haul charges (which is certainly within his rights as found by the Commission) is shown from the above description of poor service on the existing route to rest upon a misapprehension of the facts before the Commission when it ordered the two direct and more efficient routes. (R. 36, 40.)

THE PRESENT ROUTE FROM THE WEST TO THE DEL-MAR-VA REGION IN THE EAST, VIA THE PENNSYLVANIA ROUTE THROUGH HAGERSTOWN IS INADEQUATE, INEFFICIENT AND UNECONOMICAL, BOTH TO THE RAILROADS AND TO SHIPPERS AND RECEIVERS DEPENDANT THEREON.

The present Pennsylvania route from the grain producing regions of the West to the mixed feed consumers located in the Del-Mar-Va region east of Hagerstown is 1041 miles in length. (The distances given herein are between Chicago, Illinois and Salisbury, Maryland, as representative). This route requires an unnatural and expensive back-haul movement of 148 miles. In the transportation of interstate commerce, nothing can be more wasteful or inefficient than a back-haul route requiring the same shipment to move a relatively long distance over the same rails in opposite directions.

A glance at the map attached to the brief on behalf of the Government illustrates this uneconomical and ineffi-

cient service. It shows the Pennsylvania route eastbound from the west stopping abruptly at Harrisburg, and then moving 74 miles in a *southwesterly direction to Hagerstown.* From Hagerstown the route retraces itself over the same rails to Harrisburg, and then on to destinations east of Harrisburg.

In addition to this uneconomical back-haul service, this existing Pennsylvania route requires costly delays, switching and terminal services in breaking up through trains from the west at Harrisburg; the diversion of the shipments to the back-haul branch line which travels southwest 74 miles from Harrisburg to Hagerstown. The same expensive process is repeated in moving the shipment on from Hagerstown 74 miles back-haul through Harrisburg to the Del-Mar-Va region. (R. 218 *et seq.*)

Added to all of the foregoing delays and inefficiencies, there is the important fact that complainants' mill at Hagerstown is located on the Western Maryland rails, and not upon the Pennsylvania rails. This entails additional delays and terminal services in switching the cars from the Pennsylvania to the Western Maryland tracks, and from the Western Maryland back to the Pennsylvania at Hagerstown for the branch line back-haul movement north from Hagerstown to Harrisburg. (R. 218) All of the foregoing details of costly service and delays are absent when the shipments flow directly through Hagerstown on the direct routes prescribed by the Commission between the West and East via the Western Maryland Railroad, which through routes "are well established and generally accepted as reasonable by shippers and the carriers, parties thereto, to points in eastern territory." (R. 32)

The Pennsylvania finds all of this branch line back-haul and switching service so costly to it that it adds 17 per

cent to the through rate from West to East to pay for said extra service, all of which unnecessary service is obviated by the routes ordered by the Commission in this case, and which service is not needed or wanted by complainant.

In referring to this inefficient back-haul route in *D. A. Stickell & Sons, Inc.* v. *W. M. Ry.*, (146 I. C. C. 609), the Commission concludes that it can hardly be called a through route:

> "They can hardly be called a through route where the traffic moves in and out of Hagerstown over the same line and the joint rate applies only with the addition of a back-haul charge for the out-of-line movement." (614)
>
> "A route requiring such service and a special charge therefor is obviously *in a class by itself and is not comparable with the routes which require no out-of-line service or special charge therefor.*" (Emphasis supplied.) (615)

THE DIRECT WEST TO EAST ROUTES ORDERED BY THE COMMISSION ARE ADEQUATE, MORE EFFICIENT AND MORE ECONOMICAL THAN THE PRESENT BACK-HAUL ROUNDABOUT ROUTE VIA THE PENNSYLVANIA RAILROAD.

In contrast with the foregoing facts as to the indirect and unnatural route of the Pennsylvania via Hagerstown, attention is invited to the two direct routes named in the Commission's order. (R. 31.) Over new route 1 ordered by the Commission, the distance is 946 miles via Fulton Junction (Baltimore), and via York, 958 miles; and over route 2, via Fulton Junction (Baltimore), 938 miles, and via York, 950 miles. They are well-established routes over which vast tonnage has moved for years between the West and the East. One route is known as the "Pittsburgh Dispatch" and the other as the "Wabash route". They are direct tariff routes flowing right through Hagerstown, and the complainant's Mill is located right on the

rails of the Western Maryland, which carrier performs all switching service at Hagerstown. (R. 230.) The terminal services are simple and quick of operation. (R. 229.) Over the Pennsylvania route the distance is 1041 miles. (The routes and distances are shown on Exhibit 5, printed as an appendix to this brief. R. 359.)

The frequent need for speed in making deliveries of mixed feed from Hagerstown to the consumers on the Eastern shore is set forth in the record before the Commission. As representative of the record it is testified that "The customers will often call us in the evening and want their feed the next day." The inefficiency and inadequacy of the service on the Pennsylvania route involves a delay of two days. Many factors enter into the feeding of live stock and poultry for the market that demand a quick movement of feed. (R. 241.)

In order to overcome the delay and disability on the Pennsylvania route it is frequently necessary to ship the feed out from Hagerstown over the Western Maryland and the Reading Railroad to the station nearest the Eastern shore and deliver thence by truck. As the Commission finds, hundreds of carloads are moved in this way, due solely and entirely to the delays and inefficiency of the Pennsylvania route. (R. 40)

The two routes ordered by the Commission are in general use today, except as they are arbitrarily restricted by the Pennsylvania tariffs to exclude traffic not received by it West of Pittsburgh, and destined to the consumers located upon its lines in the Del-Mar-Va region. This region is controlled absolutely by the Pennsylvania. The stations are local to its lines and that carrier is in a position to exercise a monopoly power upon traffic there destined. Referring to this restriction in the use of the two routes it prescribes the Commission states as follows:

> "It is not the province of railroads to determine what markets shall be available to seliers or buyers, or,

by the refusal to establish through routes or the maintenance of rate disadvantages, to restrict or circumscribe the opportunities of shippers located on other railroads to sell in markets served by them. It is their function to transport in the channels necessitated by trade conditions and not to fix limitations on commerce. The public interest demands that all shippers be accorded relatively equal opportunities to reach all reasonably available markets." (R. 32)

From the foregoing summary of the evidence before the Commission, and the references thereto in the Commission's report, as pointed out, it is apparent that there was substantial evidence supporting the findings and order with respect to the administration of Section 15(3) and Section 15(4) of the Act. Upon such record the Commission after full hearing exercised the discretion conferred upon it by Congress in a proper and lawful manner, as found by the unanimous decision of the District Court after an ample presentation to that Court. (R. 77.)

AVERAGE SYSTEM COSTS HAVE NO APPLICATION TO THIS KIND OF A CASE.

The railroads offered certain figures as to relative average costs of service. The Division carefully considers this evidence and points out its lack of value in this case. (R. 77.) This evidence is a comparison based on the average system costs of handling all traffic over the three routes here involved.

Moreover, when it comes to using average system costs, the average system costs on all traffic are made up of many hundreds of different commodities moving in different kinds of equipment, some of it very costly (ours moves in box cars); some of it loading up to 100,000 pounds per car while others load but a small fraction of that amount (ours loading above the average) (R. 217); some of it

moving long distances and others but a few miles (ours moving from the grain fields of the west to the seaboard); some of it requiring special and costly service, while others require but a minimum (ours requires ordinary service); some of it entailing material loss and damage claims while others have practically none (the record shows ours are practically zero) (R. 217); some of it seasonal, while others move regularly throughout the year(ours moving day in and day out); and many other such items not necessary to enumerate. This attempted application of average system costs on all traffic to a single commodity therefore cannot be done with the hope of obtaining a worthwhile comparison.

The above factors prove the truth of the statement of the Commission in *Sugar from Key West to Jacksonville*, 112 I. C. C. 347 that it is difficult, if not impossible, to ascertain "the cost of transporting a particular kind of traffic for a certain distance."

And again, in *Sloss-Sheffield Iron Co.* v. *L. & N. R. R. et al.*, 30 I. C. C. 597:

> "The difficulty is appreciated of even fairly approximating the cost of transporting a unit of freight. Any method employed must necessarily be somewhat arbitrary."

With the foregoing ever-present frailties of cost studies in mind, the attempted application of such evidence to a particular situation as here presented is shown to be honeycombed with inconsistencies. Applying an average cost, itself the result of arbitrary formulas and averages on a vast railroad system, to a comparatively insignificant operation as is here attempted, the result is not even a "mere approximation" of anything.

> "Cost studies based upon the average cost of handling all traffic cannot be accepted as showing cost of

tonnage of a particular commodity or class of commodities." (*California Growers & Shippers League v. S. P. Co. et al.*, 129 I. C. C. 25.)

Again, when an attempt is made, as here, to compare average costs of one railroad with the average costs of another railroad, when there is no showing of substantially similar circumstances and conditions of terrain served or commodites handled, volume of traffic, efficiency of managements, or many other really controlling factors, the use of any such attempted comparisons to defeat the administration of Section 15 of the Act seems inartificial. And that is the basis of the cost evidence offered herein. The purported average costs shown bear no relation whatever to the traffic here involved, which entails a wasteful back-haul service, so expensive as to require a substantial extra charge to cover it.

III.

THE DISTRICT COURT CORRECTLY DECIDED THAT THE COMMISSION'S ORDER IS SUPPORTED BY PROPER FINDINGS.

The District Court sets forth in some detail the findings of the Commission (R. 94), all of which are summed up by the Commission in its ultimate finding, as follows:

> "We find that the two routes sought are necessary and desirable in the public interest and that they are needed to provide adequate and more efficient and adequate and more economical transportation and should be established, subject to the lowest through rates contemporaneously maintained on the same commodities from the same origins to the same destinations over the direct routes of the Pennsylvania or over routes in which the Pennsylvania is a participating carrier via Enola Yard near Harrisburg. (R. 41.)
>
> "An appropriate order will be entered."

The District Court correctly finds that the Commission's order is supported by essential and basic findings. This subject is amply covered in the brief on behalf of the Government.

CONCLUSION.

This case presents railroad regulation in the simplest and clearest sense of that expression in the Act to Regulate Commerce. Here is a shipper in interstate commerce that is merely requesting service over well-established existing routes. It accepts without complaint the going rates that its competitors pay. *In fact it is not seeking either service or rates that are not freely accorded its competitors.* (R. 207, 213). Complainant's situation is aptly described by the Supreme Court in *Peoria Ry.* v. *U. S.* (263 U. S. 528, 525), where the Court says that to receive and transport shipments coming from a connecting carrier is a "primary duty of a carrier." Section 15(4) of the Act was specifically amended by Congress to remove what this Court describes as the "inconvenience and hardship" to the public. *United States* v. *Mo. Pac. R. R.* (278 U. S. 269, 278).

For the reasons set forth herein, it is respectfully requested that the decree of the District Court be affirmed.

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January 4, 1945.

Appendix.

Docket #28647 (R. 359)

D. A. STICKELL & SONS, INC., HAGERSTOWN, MD.

EXHIBIT No. 5.

New York City is representative of destinations on the Pennsylvania R. R. in New Jersey and Eastern Pennsylvania. Salisbury, Md., is representative of destinations on the Eastern Shore of Maryland, Delaware and Virginia.

Route	From	To New York Miles	To Salisbury Miles	Rate on Grain Products
A	Chicago	966	934	.26½
B	"	975	943	.26½
C	"	1054	1041	.26½ plus 4½ cents
A	St. Louis	1162	1130	.30½
B	"	1154	1122	.30½
C	"	1197	1184	.30½ plus 4½ cents
E	Decatur, Ind.	840	808	.30½
F	"	797	765	.30½
C	"	927	914	.30½ plus 4½ cents
A	Peoria, Ill.	1190	1158	.28½
D	"	1132	1100	.28½
C	"	1205	1192	.28½ plus 4½ cents

Route A—N. Y. C. R. R. Youngstown, Pa.—P. & L. E. Connellsville, Pa. W. M. Ry. to York, Pa. or Baltimore, Md.—P. R. R. to Destination.

Route B—Wabash R. R. to Toledo, O.—W. & L. E. to Pittsburg Jct. Pa. P. & W. V. to Connellsville, Pa.—W. M. Ry. to York, Pa. or Baltimore, Md.—P. R. R. to Destination.

Route C—P. R. R. to Destination with back-haul from Harrisburg, Pa. to Hagerstown, Md.

Route D—T. P. & W. R. R. to Forrest, Ill.—Wabash and Route B.

Route E—N. K. P. R. R. to Toledo, Ohio and Route A.

Route F—N. K. P. R. R. to Bellevue, O.—W. & L. E. to Pittsburg Jct., Pa. P. & W. V. R. R. to Connellsville, Pa.—W. M. Ry. to York, Pa. or Baltimore, Md.—P. R. R. to Destination.

Note 1—Route C includes a back-haul of 146 miles between Harrisburg, Pa. and Hagerstown, Md., and adds 4½ cents or 90 cents per ton to the through rate.

Note 2—All routes except C are requested routes, but are standard used routes as far as Baltimore, Md., or York, Pa.

Note 3—All rates are reshipping rates except from Decatur, Ind.

Tariff Authority: Jones 245 G—I. C. C. 3356.
Jones 470 B—I. C. C. 3490.
Transit tariff, P. R. R. 1272 C—I. C. C. 2442.
Transit tariff, W. M. Ry. I. C. C. 8662.

SUPREME COURT OF THE UNITED STATES.

No. 182.—October Term, 1944.

The Pennsylvania Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, et al., Appellants, *vs.* The United States of America, Interstate Commerce Commission, D. A. Stickell & Sons, Inc.	Appeal from the District Court of the United States for the District of Maryland.

[January 29, 1945.]

Mr. Justice Roberts delivered the opinion of the Court.

This is an appeal from a decree[1] of a District Court of three judges dismissing the petition of the appellants, thirteen trunk line railroads, for an injunction annulling an order of the Interstate Commerce Commission,[2] which required the railroads to establish and maintain two through routes.

The Commission's order was made after hearing upon a complaint of D. A. Stickell & Sons, Inc., a manufacturer of mixed feeds at Hagerstown, Md. This concern obtains its inbound raw material of grain and grain products, etc., from manufacturing plants located in so-called central territory. These are mixed and the mixed aggregate moves from the plant at Hagerstown to points eastward, but principally to the so-called Del-Mar-Va Peninsula, a portion of Delaware, Maryland, and Virginia, which is served solely by the Pennsylvania Railroad. Hagerstown lies on the main li. of the Western Maryland Railway. The Pennsylvania serves it by a branch line running from Harrisburg, Pa., to Winchester, Va., and the Baltimore & Ohio by a branch line running north from its main line at Weverton, Maryland. The railroads accord transit facilities at Hagerstown whereby Stickell may receive the inbound materials, mix them, and ship the products to destination on a through rate plus a transit charge as if the move-

[1] 54 F. Supp. 381.

[2] D. A. Stickell & Sons, Inc., v. Alton R. Co., 255 I. C. C. 333.

ment had been a through one from origin to destination. The handling of freight moving over the Pennsylvania Railroad will illustrate the problem. The so-called back-haul, or out of-line haul, required to reach Hagerstown from the Pennsylvania's main line is 74.5 miles in each direction and the additional charge for it is 4.5 cents per cwt., or about 17% of the through rate. Interchange and switching operations to reach the Stickell plant are performed by the Western Maryland and the Pennsylvania absorbs these charges. The Commission's order established two new through routes which included the Western Maryland, the line which serves the Stickell plant. Both reduced the Pennsylvania's line haul to that portion of the routes eastward of York, Pa., or Fulton Junction (Baltimore), Maryland, in respect of shipments to the Del-Mar-Va Peninsula, thus depriving the Pennsylvania of a long haul from points west of Pittsburgh, Pa., through Harrisburg, Pa.

The gravamen of Stickell's complaint before the Commission was that the back-hauls involved in existing routes delayed its shipments and, while the charge for such back-hauls was reasonable, the addition of this charge to the through rate cut into its margin of profit, which is small. These factors, it claimed, deprived it of its rightful competitive relation to other manufacturers of mixed feed.

The Commission's authority to grant relief is bottomed on § 15(3) and (4) of the Interstate Commerce Act as amended.[3] The subsection first mentioned authorizes the Commission, when it deems it to be "necessary or desirable in the public interest" to establish through routes and joint rates. The succeeding subsection is a limitation on the Commission's power, derived in part from earlier enactments, prohibiting the Commission from requiring a line-haul carrier to short-haul itself as a participant in a prescribed through route. The earlier part of the paragraph retains the prohibition against short hauling but contains exceptions, one of which, designated (b), is "unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: . . . ". The principal controversy in the cause turns on the proper interpretation of the quoted exemption from the general prohibition of through routes which involve short hauling. There are certain subsidiary issues which will be noticed.

[3] 49 U. S. C. § 15(3)(4).

The opposing views of the parties may be summarized. The appellants argue that the phrase "adequate, and more efficient or more economic, transportation" refers to carrier operations and expense and has no reference to the broader public interest which embraces service to shippers and the rates they pay. The appellees urge that the phrase comprehends the adequacy of service, its cost to the shipper, and the convenience, efficiency, and cost of the carriers' operations. The Commission took the latter view. In its decision it purported to consider all these elements and, on appraisal of them, concluded the two routes it prescribed were justified by § 15(4). The court below sustained the Commission. We think its judgment was right.

Without reciting in detail the statutory history, which is given in full in the opinion below, it will suffice to say that the Commission originally construed the short-haul provision of the Interstate Commerce law as protecting only the haul of the originating carrier. In *United States* v. *Missouri Pac. R. Co.*, 278 U. S. 269, this construction was overruled. Decision was handed down after the Commission had made an order on an earlier complaint of Stickell, similar to the order here involved;[4] but, after this court's decision, the Commission set aside the order in conformity to our opinion. Several unsuccessful attempts were thereupon made to induce Congress to repeal the short-haul prohibition. When the 1940 amendment to the Interstate Commerce Act was on its passage, the short-haul prohibition was eliminated by the Senate. The House retained the provision without change.

In conference § 15(4) was amended by permitting the Commission to require a carrier to short-haul itself under the conditions specified in the language we have quoted. Thus the two sections—15(3) and (4)—since 1940 have provided that the Commission may establish a through route if found to be "in the public interest" but may not establish such a route which requires a carrier to short-haul itself unless it finds that the route will provide adequate, and more efficient or more economic, transportation. The appellants suggest that if the latter phrase be construed as the Commission has construed it the two sections taken together will be redundant for subsection (3) permits the establishment of a through route only if it is in the public interest, and the short-haul provision may be disregarded only if so to do

[4] Stickell & Sons *v.* Western M. Ry. Co., 146 I. C. C. 609.

would be in the public interest. But we think this is not a fair construction of the statute. It is conceivable that the Commission might refuse to establish many through routes as not required in the public interest where short hauling is not involved. On the other hand, if the Commission is asked to abrogate the general rule with regard to the short-haul, the statute says it must have regard to several matters. The first of these is adequacy of transportation. The expression would seem to apply only to the interest of the shipping public. The second and third matters to be considered are efficient and economic transportation. These expressions may well embrace both shippers' and carriers' interests. Congress had a purpose in amending the provision, and we think the Commission was not in error in construing the language used as evincing an intent that both interests should be considered and a fair balance found.

The appellants refer to legislative history, to the policy declared in the Interstate Commerce legislation, to the definition of transportation in the statute, and other aids to construction, in support of their argument. These were, in our view, adequately discussed by the court below. We have considered them but they do not persuade us that the Commission and the District Court were wrong in their interpretation of § 15(4).

The appellants contend that even if the Commission was right in its interpretation of its statutory authority, its over-all conclusion is not supported by evidence or by the subsidiary findings. The claim is that the Commission did not make findings that the expense and inconvenience to the carriers concerned of rendering services over routes involving four, five, or six railroads, with the consequent interchange of traffic, would not be inordinately expensive and burdensome, and they point to certain evidence offered before the Commission which they say the Commission ignored. In the court below the same contention was considered and overruled. True, the Commission's findings are not sharp and clear on the point, but the matter was not ignored and the Commission's decision refers to it. We are unable to say that there was not sufficient in the record before the Commission, and in its findings, to justify the conclusion that the Commission, as it says it did, weighed the evidence and found that the balance was in favor of the order made.

Judgment affirmed.